IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

(A) (1) (i) APPEAL NO.359 OF 2004
IN
COMPANY APPEAL NO. 1 OF 2004
IN
COMPANY PETITION NO. 41 OF 2002
WITH
NOTICE OF MOTION NO.1706 OF 2004
THEREIN TAKEN OUT BY THE APPELLANTS

1. Vaishnav Shorilal Puri

2. Vishal Vaishnav Puri
Both residing at Vaishno Kunj,
122-Gulmohar Cross Road No.10,
JVPD Scheme, Mumbai - 400 049. .. Appellants

Versus

1. Kishor Kundan Sippy
residing at D-143, Petit Hall,
66, Napean Sea Road,
Mumbai - 400 006.

2. Kundan H. Sippy
residing at 102, Miami,
70/A, Bhulabhai Desai Road,
Mumbai 400 026.

3. Samrat Shipping & Transport P. Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
16, Jolly Maker Chamber No.2,
Nariman Point, Mumbai-400 021.

4. Seaworld Shipping & Logistics Pvt.Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
FO-14, Sapna Terrace, Swatantra Path,
Vasco-da-Gama, Goa and now having
shifted its registered office at
NCL Bldg., 8th Floor,
Bandra Kurla Complex,
Bandra (East), Mumbai-400 051
Formerly known as "Samrat Shipping
Logistics Privated Limited". .. Respondents

Mr.Aspi Chinoy, Senior Advocate with Mr.J.P.Sen i/by M/s.Federal & Rashmikant & Co. for Appellants.

Dr.Veerendra Tulzapurkar, Senior Advocate with Mr.Rahul Chitnis and Ms.Leena Desai i/by M/s.Wadia Ghandy for

res.Nos.1 & 2.

Mr.M.S.Doctor i/by Kerban Anklesaria for res.No.4.

WITH

(ii) APPEAL NO. 468 OF 2004
IN
COMPANY APPEAL NO. 4 OF 2004
IN
COMPANY PETITION NO. 41 OF 2002

Seaworld Shipping & Logistics Pvt.Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
FO-14, Sapna Terrace, Swatantra Path,
Vasco-da-Gama, Goa and now having
shifted its registered office at
NCL Bldg., 8th Floor,
Bandra Kurla Complex,
Bandra (East), Mumbai-400 051
Formerly known as "Samrat Shipping
Logistics Privated Limited". .. Appellants

Versus

1. Kishor Kundan Sippy
residing at D-143, Petit Hall,
66, Napean Sea Road,
Mumbai - 400 006.

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residing at 102, Miami,
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Mumbai 400 026.

3. Samrat Shipping & Transport P. Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
16, Jolly Maker Chamber No.2,
Nariman Point, Mumbai-400 021.

4. Vaishnav Shorilal Puri

5. Vishal Vaishnav Puri
Both residing at Vaishno Kunj,
122-Gulmohar Cross Road No.10,
JVPD Scheme, Mumbai - 400 049. .. Respondents

Mr.M.S.Doctor i/by Kerban Ankalsaria for appellants.

Dr.Veerendra Tulzapaurkar, Sr.Advocate with Mr.Rahul Chitnis and Ms.Leena Desai i/by M/s.Wadia Ghandy for

res.Nos.1 & 2.

Mr.J.P.Sen with Mr.Farhan Dubash i/by M/s.Federal & Rashmikant for res.Nos.4 & 5.

WITH

(2) (i) APPEAL NOS. 396 OF 2004
IN
COMPANY APPEAL NO. 5 OF 2004
IN
COMPANY PETITION NO. 41 OF 2002

1. Vaishnav Shorilal Puri

2. Vishal Vaishnav Puri
Both residing at Vaishno Kunj,
122-Gulmohar Cross Road No.10,
JVPD Scheme, Mumbai - 400 049. .. Appellants

Versus

1. Kishor Kundan Sippy
residing at D-143, Petit Hall,
66, Napean Sea Road,
Mumbai - 400 006.

2. Kundan H. Sippy
residing at 102, Miami,
70/A, Bhulabhai Desai Road,
Mumbai 400 026.

3. Samrat Shipping & Transport
Systems P. Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
16, Jolly Maker Chamber No.2,
Nariman Point, Mumbai-400 021.

4. Seaworld Shipping & Logistics Pvt.Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
FO-14, Sapna Terrace, Swatantra Path,
Vasco-da-Gama, Goa and now having
shifted its registered office at
NCL Bldg., 8th Floor,
Bandra Kurla Complex,
Bandra (East), Mumbai-400 051
Formerly known as "Samrat Shipping
Logistics Privated Limited". .. Respondents

Mr.J.P.Sen with Mr.Farhan Dubash i/by M/s.Federal & Rashimkant for appellants.

Dr.Veerendra Tulzapurkar, Sr.Advocate with Mr.Rahul Chitnis and Ms.Leena Desai i/by M/s.Wadia Ghandy for res.Nos.1 & 2.

Mr.M.S.Doctor i/by Keerban Anklesaria for res.No.4.

AND

(ii) APPEAL NO. 469 OF 2004
IN
COMPANY APPEAL NO. 5 OF 2004
IN
COMPANY PETITION NO. 41 OF 2002

Seaworld Shipping & Logistics Pvt.Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
FO-14, Sapna Terrace, Swatantra Path,
Vasco-da-Gama, Goa and now having
shifted its registered office at
NCL Bldg., 8th Floor,
Bandra Kurla Complex,
Bandra (East), Mumbai-400 051
Formerly known as "Samrat Shipping
Logistics Privated Limited". .. Appellants

Versus

1. Kishor Kundan Sippy
residing at D-143, Petit Hall,
66, Napean Sea Road,
Mumbai - 400 006.

2. Kundan H. Sippy
residing at 102, Miami,
70/A, Bhulabhai Desai Road,
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3. Samrat Shipping & Transport
Systems P. Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
16, Jolly Maker Chamber No.2,
Nariman Point, Mumbai-400 021.

4. Vaishnav Shorilal Puri

5. Vishal Vaishnav Puri
Both residing at Vaishno Kunj,
122-Gulmohar Cross Road No.10,

JVPD Scheme, Mumbai - 400 049. .. Respondents

Mr.M.S.Doctor i/by Kerban Anklesari for appellants.

Dr.Veerendra Tulzapurkar, Sr.Advocate with Mr.Rahul Chitnis i/by M/s.Wadia Ghandy & Co. for res.Nos.1 & 2.

Mr.J.P.Sen with Mr.Farhan Dubash i/by M/s.Federal & Rashmikant for res.Nos.4 & 5.

WITH

(B) APPEAL NO. 358 OF 2004
IN
COMPANY APPEAL NO. 2 OF 2004
IN
COMPANY PETITION NO. 40 OF 2002
WITH
NOTICE OF MOTION NO.1705 OF 2006
AND
NOTICE OF MOTION NO.892 OF 2005
TAKEN OUT THEREIN BY THE APPELLANTS

1. Vaishnav Shorilal Puri
2. Vishal Vaishnav Puri
3. Poonam V. Puri
   All three residing at Vaishno Kunj,
   122-Gulmohar Cross Road No.10,
   JVPD Scheme, Mumbai - 400 049. .. Appellants

Versus

1. Kishor Kundan Sippy
   residing at D-143, Petit Hall,
   66, Napean Sea Road,
   Mumbai - 400 006.

2. Kundan H. Sippy
   residing at 102, Miami,
   70/A, Bhulabhai Desai Road,
   Mumbai 400 026.

3. Samrat Tankages Pvt. Ltd.
   a Company incorporated under the
   provisions of the Companies Act, 1956
   having its registered office at
   64, Jolly Maker Chamber No.2,
   Nariman Point, Mumbai-400 021.

4. Samrat Shipping Co. Pvt. Ltd.
   a Company incorporated under the

provisions of the Companies Act, 1956
having its registered office at
63, Jolly Maker Chamber No.II,
Nariman Point, Mumbai-400 021.

5. Samrat Container Terminals Pvt. Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
64, Jolly Maker Chamber No.2,
Nariman Point, Mumbai-400 021.

6. Delta Shipping Co. Pvt. Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
63, Jolly Maker Chamber No.2,
Nariman Point, Mumbai-400 021.

7. Samrat Shipping & Transport
Systems Pvt. Ltd.
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
16, Jolly Maker Chamber No.II,
Nariman Point, Mumbai-400 021. .. Respondents

Mr.Iqbal Chagla, Senior Advocate with Mr.F Divitre and Mr.Farhan Dubash i/by M/s.Federal & Rashmikant for appellants.

Dr.Veerendra Tulzapurkar, Sr.Advocate with Mr.Rahul Chitnis and Ms.Leena Desai i/by M/s.Wadia Ghandy for res.Nos.1 & 2.

WITH

NOTICE OF MOTION NO.391 OF 2005
IN
APPEAL NO.358 OF 2004

1. Vaishnav Shorilal Puri & ors. ... Appellants

V/s.

1. Kishore Kundalal Sippy & ors. ... Respondents

A n d

Hewlett Packard India Sales Pvt.Ltd.,
92, Industrial Suburb II Stage,
Yeshwanthpur, Bangalore 560 022. ... Applicant

Mr.Iqbal Chagla, Sr.Advocate with Mr.F. Divitre and Mr.Farhan Dubash i/by M/s.Federal & Rashmikant for

appellants.

Dr.Veerendra Tulzapurkar, Sr.Advocate with Mr.Rahul Chitnis and Ms.Leena Desai i/by M/s.Wadia Ghandy for res.Nos.1 & 2.

Mr.Arif Bookwala, Senior Advocate i/by Antany Alex for applicant.

CORAM: H.L. GOKHALE &
J.P.DEVADHAR, JJ.

DATE OF RESERVING THE JUDGMENT : 12/12/2005

DATE OF PRONOUNCING THE JUDGMENT: 31st March 2006

JUDGMENT: (Per H.L. Gokhale, J.)

1. All these appeals under the Letters Patent raise by and large common questions of law and facts and are therefore heard and are being decided together. These appeals arise principally as a result of a dispute between two groups of business magnets, i.e. Puri Group and Sippy Group, to claim the general agency business with an International shipping company by name Contship Containers Lines Ltd. (for short "Contship") which is engaged in operating vessels for transport of cargo. These Sippy Group and Puri Group are having equal shares and equal number of directors in two Indian Shipping Companies by name Samrat Shipping Company Ltd. (for short "SSCO") and Samrat Shipping & Transport Systems Ltd. (for short "SSTS"). Both these companies are private companies. The appeals arise out of the allegations of oppression and mismanagement by the Sippy Group against the Puri Group and the proceedings under the Companies Act on account of the diversion of the Contship agency from SSTS to a company floated by the Puri Group.

2. This SSTS was having principally two types of businesses; one was agency business and the other was charter business. The agency business included the business with and for Contship. The agency business was all throughout being looked after by Puris whereas the charter business was being looked after by Sippys. The major profit of the company was through the agency business. It is the grievance of the Sippy Group that Puri Group diverted the agency business with Contship to another company floated by them and named as Samrat Shipping & Logistics Ltd. (for short "Samrat Logistics") whose name was later on changed to Seaworld Shipping & Logistics Pvt. Ltd. (for short "Seaworld"). It was alleged by the Sippy Group that this diverting of business by Puris was in breach of their fiduciary obligation as directors and amounted to its oppression in SSTS as well as in SSCO within the meaning of section 397 of the Companies Act, 1956 (for short "the Act"). This grievance was the main cause leading to filing of two company petitions under sections 397, 398 and 399 read with 402, 403 and 406 of the Act by Sippy Group to the Company Law Board (CLB) and seeking a direction to make good the advantage gained as provided under section 88 of the Indian Trusts Act, 1882. The defence of Puri Group was that there were other prior disputes on financial aspects between Puris and Sippys and there was no confidence subsisting between the parties. Besides, the agency agreement with SSTS had been terminated by

Contship itself as per the terms of the agreement by a three months' notice dated 1.9.2001 and had come to an end on 30.11.2001. Therefore, no corporate opportunity was any longer available to SSTS to claim this business with Contship. Contship had changed their agents in India in the past also. Therefore, according to Puris, the grievance about the alleged diversion of business with Contship to Seaworld cannot amount to breach of any fiduciary duty and/or oppression or mis-management nor any direction to make good the advantage be passed. These company petitions were substantially allowed by the CLB leading to four appeals by Puri Group to a Single Judge of this Court under section 10-F of the Act. The appeals have been substantially disallowed by a common judgment and order dated 23rd February 2004 and this common decision on those appeals has led to the present group of appeals under Letters Patent. The appellants have taken out Notices of Motion for stay. Apart from Motions for stay and other interlocutory reliefs, a notice of motion concerning one property of the companies occupied by a third party has been taken out by that third party in these appeals. All these Motions are also heard and are being decided along with these appeals.

3. The short facts leading to these appeals are as follows:-

. This company-SSCO was incorporated in the year

1975 as a private shipping company with equal shareholding of Sippy Group led by one Kundan Sippy and another group known as Jaisingh Group. Vaishnav Puri of the Puri Group was employed at that time as a Senior Manager with Tata Group of Companies and handled its shipping liner business. Some times in 1977-78, Vaishnav Puri joined SSCO leading to Sippy Group, Jaisingh Group and Puri Group each having 33% shareholding in SSCO.

4. (i) Subsequently, Vaishnav Puri secured the agency of Contship for SSCO. An agreement between the two was entered into on 1st February 1991. This business developed over the years.

(ii) Sometimes around 1994, disputes arose between Jaisingh Group and Sippy Group inter se resulting into litigation. One of the causes of the dispute was stated to be with respect to the use of the word "Samrat". In view of this dispute, Contship terminated the agency of SSCO by end of June 1996.

5. On 28th August 1996, SSTS was incorporated only by Puris and Sippys with equal shareholding. Contship appointed SSTS as its agent with effect from 1st October 1996. Jaisingh Group separated thereafter in March 1997. As a part of the settlement, the Jaising Group were not to use the word "Samrat" anylonger.

6. (i) As stated earlier, Puri Group looked after the liner agency business all throughout, whereas the Sippy Group looked after its charter business. By the end of March 2001, the income from agency business went up from Rs.13 millions to Rs.23 millions. In the same period, the charter business showed a loss of Rs.3.58 crores.

(ii) There is another significant development which has got to be noted. A private company by name Meridian Trading Pvt. Ltd. was set up as a subsidiary of SSCO some time in July 1988. It was to manufacture and export leather garments. It was looked after exclusively by Sippys. SSCO invested substantial amount in this company, but it consistently made losses and no dividends have ever been declared. It is the case of Puris that by end of March 2000 Meridian had a financial exposure of Rs.13 crores. It is their case that because of the disputes about the financial position of Meridian that the accounts were initially not signed. The accounts were finally signed by Puris after the Sippys assuring that personal guarantee by Puris for Meridian will be released and Meridian will be taken over by Sippys as a part of separation of business.

(iii) Disputes, correspondence and discussions between the parties were going on either for conciliation or for separation. Lists of jointly held assets and businesses were prepared. Assistance of a professional mediator was taken.

7. On this background, Sippy Group came to know in the first week of December 2001 about the Puri Group having set up a company by name Samrat Shipping & Logistics Pvt. Ltd. (for short "Samrat Logistics"). It also noted advertisements issued by Samrat Logistics on 10th December 2001 and 14th December 2001 holding out that it was the general agent of Contship in India. The Sippys were not informed about the notice of termination dated 1.9.2001 sent by Contship to SSTS which was received by Puris. The Sippy Group gave a notice to Samrat Logistics on 2nd January 2002 calling upon it to desist from using the word "Samrat". Initially efforts were made for mediation in January 2002 through an Advocate acting as Mediator. However, since they were not fruitful, ultimately the negotiations were terminated by Sippys and they filed a suit bearing No.400 of 2002 in this court seeking various reliefs against Samrat Logistics. This was mainly with respect to the use of word "Samrat" by Samrat Logistics. This suit was filed in the name of SSTS and SSCO. The Puri Group objected to the suit being filed in the name of these two companies and therefore the suit was withdrawn on 7/8th February 2002 with liberty to file a fresh suit.

8. Thereafter, Sippys wrote to Puris calling upon a meeting of the Board of Directors to consider action against Samrat Logistics, but Vaishnav Puri disputed

that Kundan Puri should preside over the meeting as Chairman. He suggested that the meeting should be called after an independent Chairman is appointed. Correspondence went on between the parties on these technicalities. Ultimately, the Sippy Group filed another suit bearing No.876 of 2002 in the High Court as a derivative action in their individual names as shareholders of SSTS against Puri Group and Samrat Logistics. They sought relief by way of injunction restraining the use of the word "Samrat" and restraining the passing off on that basis. The Puri Group produced in the court the records relating to incorporation of Samrat Logistics and ultimately agreed in April 2002 to change the name of Samrat Logistics to Seaworld Shipping & Logistics. In view thereof, this suit was subsequently withdrawn in September 2002 after filing the present company petitions.

9. (i) In June 2002, the Sippy Group filed Company **Petition No.41 of 2002** before the CLB invoking sections 397 and 398 of the Act. It was filed against SSTS, Vaishnav Puri, Vishal Puri, Seaworld and Contship. It was alleged that the Puri Group had in breach of its fiduciary obligations to SSTS got the agency agreement of SSTS dated 1st October 1996 with Contship terminated and had induced Contship to enter into an agency agreement with Seaworld from 1st December 2001. The Sippy Group complained of oppression of mismanagement in the matter of SSTS.

(ii) The Sippy Group filed another petition being **Company Petition No.40 of 2002** before the CLB. This was concerning the oppression and mismanagement by Puris in the matter of SSCO. Apart from raising the dispute about the diversion of the Contship agency of SSTS to a Puri company as affecting SSCO as well, it raised the question of Puris diverting an amount of Rs.49 lakhs lent to them by SSCO to purchase the shares of another company Neptune Oriental Lines (India) Pvt. Ltd. (N.O.L. for short) for the benefit of Puris and not refunding the amount . We will deal with this petition after dealing with Company Petition No.41 of 2002.

10. **Company Petition No.41 of 2002** prayed for an injunction restraining Puris from transferring any funds out of India received from the agency agreement. It also sought mandatory order directing Contship to deposit in the CLB the amounts of commission, fees and remuneration received. The Sippy Group had alleged collusion between the Puri Group and Contship. It was contended that the business of SSTS to the tune of US$ 5 million per year was being deprived and diverted. It was submitted that Contship was liable to the Sippy Group and to SSTS as a constructive trustee. In para 26 of this petition, it was contended that floating of another company by using the name of "Samrat" for wrongful personal gain was an act of fraud on SSCO and the company (SSTS) and that the Puris had acted in

breach of their fiduciary duties and their conduct was harsh, burdensome and oppressive. In para 37, it was contended that there was a complete deadlock in the management, but to wind up the company would be unfairly prejudicial to the Petitioners.

11. (i). It is however relevant to note that Contship applied in that proceeding by filing Application No.162 of 2002 to be deleted as a Respondent on the ground that the agency agreement with SSTS had already been terminated and it was not a necessary party to the petition for oppression and mismanagement. This application made in August 2002 was allowed by the CLB by its order dated 11th November 2002. It is material to note that in the application, which was filed by Contship for this purpose, Contship specifically stated that it was aware that there were other shareholders in both SSCO and SSTS, but it had dealt with only Puris and "it had continued to have confidence in the professionalism of and faith/ trust in Mr.Puri to look after the interest of Contship in India." According to Puris, it is relevant to note that from 7th December 2001 onwards (when Sippys came to know about the business with Contship having been diverted), Sippys made no efforts to request Contship to reconsider their decision. The affidavit of Contship further stated that its commercial interest in India had been looked after by Mr.Puri all throughout and that it had never dealt with Sippys. It further stated that it had terminated

the agency of SSTS as it was concerned with safeguarding its own commercial and financial interest.

(ii). Contship pointed out in this application that earlier SSCO was appointed as an agent from 1st February 1991 and this agency continued until 30.9.1996. SSTS was appointed as the agent from 1.10.1996. Clause 7.01 of the Agreement dated 1.10.1996 had provided the mechanism for termination and the agency had been terminated in accordance therewith. This Clause read as follows:-

> "7.01 This Agreement shall continue until terminated by either Party giving the other not less than three months' notice in writing. In case of termination, the Agent shall always be entitled to receive usual commission in cargo booked by them in the notice period of three months, but shall not be separately entitled to compensation."

(iii). In para (vii), Contship had stated as follows:-

> "(vii) It is a matter of fact that the Applicant Company has always dealt with Mr.Vaishnav Shorilal Puri, Respondent No.2 herein. The Applicant Company was aware that there were Shareholders and Directors other than Respondent No.2 in both Samrat Shipping Company Private

Limited and Samurai Shipping & Transport Systems Private Limited but Applicant Company never had dealing with any other person/s on any matter. The Applicant Company always had and continue to have confidence in the professionalism and faith/trust in Mr.Puri to look after the interest of the Applicant Company in India. In the changing scenario of globalization, the Applicant Company is considering various options in continuing its business activities in India either through Respondent Nos.2 or otherwise."

(iv). In para (viii), Contship averred as follows:-

" .... It is obvious that the Applicant Company has been made a party to the proceedings more to harass the Applicant Company and as a pressure tactic against Respondent No.2. The Applicant company has an ongoing business of a shipping line and was never and is not interested in the litigation or concerned with the litigation or the results of the litigation between the Sippys and Puris. .... "

12. Puris filed their initial reply of V.S. Puri - Respondent No.2 affirmed on 20th August 2002 (styled as a Limited reply) denying that they had caused Contship to terminate SSTS agency, but pointed out that Contship itself had terminated it by its letter of 1st September

2001. Puris specifically averred in para 4.8 and 5.3 of this reply that right from early 2000, disputes had arisen between Puris and Sippys. It was alleged that large amounts were being diverted from SSTS to Meridian through SSCO. It was further alleged that by 2000-2001 approximately Rs.9.5 crores had been advanced by SSTS to SSCO and from that Rs.4 crores were diverted to Meridian. There is no specific rejoinder to this allegation. It was averred in para 5.1 that V.S. Puri had initially refused to sign / approve Meridian's account in 2000. He had finally agreed to do so only on Sippys' assurance that they would agree for release of the personal guarantee of V.S. Puri and corporate guarantee of SSCO towards Meridian Trading Pvt. Ltd. Mr.Puri had also stated that Sippys had assured that parties would work towards separation of the joint businesses and assets whereunder Meridian's losses would be taken over by Sippys. There was no rejoinder to this statement. It was further stated in para 5.2 of the reply that Sippys failed to arrange for release of the personal guarantee of V.S. Puri. There is no denial to that in the rejoinder filed by Sippys. It is also seen from the record that list of assets and businesses and their valuation had been prepared by the auditors for the purposes of division/separation, but it did not ultimately conclude satisfactorily. It was further contended by Puris in para 5.3 of their affidavit that by 2001, good amount of SSTS fund was locked up in SSCO / Meridian. It was affecting the cash flow of SSTS and

its ability to duly and timely make the payments to Contship. There was no rejoinder to that.

13. Paragraphs 5 to 5.16 of the reply are dealt with only in para 38 of the rejoinder of Sippys by saying that the allegations are denied and the issues regarding Meridian are irrelevant. It is then stated in this para 38 -

> "I say that assuming whilst denying that the allegations are correct, it does not entitle the Respondent No.2 and 3 (Puris) to indulge in illegal actions. I say that the Respondent No.2 has referred to various correspondence, balancesheets and documents in connection with Meridian which are irrelevant here."

It is also on record that in October 2001 the auditors informed Mr.Puri that they were unable to proceed with the audit of Meridian as Sippys had failed to produce the stock record. It was the submission of Puris therefore that relations between the parties were already strained and hardly any confidence remained between two of them. Mr.Puri further alleged in his affidavit that Sippys had floated two more companies, viz. Swaraj Fashions Pvt. Ltd. and Swaraj Shipping & Logistics Pvt. Ltd. under the management of Meridian and diverted the business and assets of Meridian to those companies. Though Meridian was suffering losses,

those companies are stated to be having good profits. There is no specific denial thereof by Sippys.

14. A reply was filed on behalf of Seaworld which pointed out that it was having an independent contract with Contship from 1.12.2001 and that the contract of Contship with SSTC had been terminated much prior to the filing of the Company Petition in June 2002. It was submitted that the reliefs sought against Seaworld were outside the jurisdiction of CLB.

15. Puris filed further affidavits in reply from time to time and Sippys also filed their rejoinders thereto.

16. The CLB heard the counsel for the parties. A number of authorities were cited before it. It finally heard and disposed of Company Petition No.41 of 2002 by its order dated 29th October 2003. The CLB came to the conclusion that the entire exercise of getting the Contship agency to Seaworld had been preplanned by the Puri Group even when the agency was subsisting between Contship and SSTS. The CLB noted that Vaishnav Puri has not disclosed the receipt of notice of termination dated 1st September 2001 received from Contship to the Board of SSTS. Contship entered into agency with Seaworld on 1st December 2001 and the Seaworld issued its service schedule from 14th December 2001. The agreement could not have been signed on 1st December 2001 without prior

consultation with Contship. The inference was therefore drawn that Vaishnav Puri had used his knowledge derived in his capacity as Managing Director of SSTS to his own advantage in termination of the agency with SSTS. The prior incorporation of another company Seaworld and thereafter Contship entering into this company immediately after terminating the agreement with SSTS indicated the breach of fiduciary duties on the part of Puris.

17. The CLB held that the statement by the Puri Group that Contship was not willing to deal with SSTS in view of the disputes between Sippy Group and Puri Group had not been substantiated. Letters of Contship dated 1st September 2001 and 26th April 2002 did not say anything of the kind, though Contship had very much reposed confidence in Puris and desired to deal with them. The CLB therefore observed that the directors of Puri Group had breached their fiduciary duties and were liable to account for the benefit and so also was Seaworld liable for the business and profit derived by it. This is on the footing that the Puris are supposed to hold the benefit derived by them as constructive trustees of the beneficiary.

18. The CLB therefore gave three directions on this Company Petition No.41 of 2002.

(i) The first direction is what is contained in para

22 and 23 of the order. This is to hold Seaworld to be accountable for the benefit derived by it as a result of breach of fiduciary duties by Vaishnav Puri and Vishal Vaishnav Puri. Sealworld had been given an agency for 5 years from 1st December 2001. The CLB held that it would not be proper to direct Seaworld to be accountable for all these 5 years. It directed it to account for the benefits and profits derived by it from 1st December 2001 until 21st July 2003, the date when the hearing concluded before the CLB. This was on the ground that breach of fiduciary duty is not only an act of oppression under section 397 of the Act, but is also an act of mismanagement under section 398 of the Act.

(ii) The second direction was contained in para 25 of the order, that is to direct the Puri Group to purchase the shares held by Sippy Group in SSTS and Sippy Group to buy shares to Puri Group in SSCO.

(iii) Since the purchase of shares cannot be done without proper valuation, the CLB directed the appointment of an independent valuer to value the shares of both the companies. The CLB also directed the valuer to compute the amount of profit that Seaworld had derived from the agency with Contship from 1st December 2001 to 31st March 2003. In essence, Company Petition No.41 of 2002 was allowed.

19. The order of CLB and the directions in Company

Petition No.41 of 2002 gave rise to three company appeals under section 10-F of the Act which are as follows:-

(i) **Company Appeal No.1 of 2004** was filed by Puris since they were aggrieved by the judgment and order in this petition.

(ii) **Company Appeal No.4 of 2004** was filed by Seaworld to challenge the directions given therein to Seaworld to account for the profits derived by it from the agency with Contship from 1st December 2001 till 21st February 2003 as noted above.

(iii) **Company Appeal No.5 of 2004** was filed by Sippys since they were not happy with the part of the directions awarding profits for a specified period only. In their view, the profits should have been directed to be paid until shares of Sippy Group in SSTS were fully purchased by Puri Group or until the termination of Contship agency with Seaworld whichever would be earlier.

20. **Company Appeal No.2 of 2004 arising out of Company Petition No.40 of 2002**:

As stated earlier, we will be dealing with Company Petition No.40 of 2002 later. It is necessary to note, however, at this stage, that this petition filed by

Sippys concerning the alleged oppression and mismanagement in SSCO was also allowed by the CLB while deciding Company Petition No.41 of 2002. The CLB rendered a common judgment on both these petitions on 29th October 2003. In Company Petition No.40 of 2002, the CLB gave direction to Puris to pay interest on account of alleged delay on their part in repayment of the amount of Rs.49 Lakhs lent to Puris by SSCO. According to Sippys, this amount was not returned by Puris within the period of four years provided for returning it. The CLB directed the Puris to pay interest at 12% for the period beyond four years until the amount was refunded. CLB directed exchange of shares of SSCO also. This decision on Company Petition No.40 of 2002 gave rise to Company Appeal No.2 of 2004 by Puri Group. The learned Single Judge decided this Company Appeal No.2 of 2004 along with earlier mentioned three appeals bearing Nos.1, 4 and 5 of 2004. We will deal with Company Appeal No.2 of 2004 when we deal with Company Petition No.40 of 2002.

21. **Issues framed:-**

(i). As far as these three appeals, namely Company Appeals No.1, 4 and 5 of 2004 are concerned, the learned Single Judge framed a number of issues separately in all these three matters. In **Company Appeal No.1 of 2004**, the main issues therefrom were as follows:-

(A) What is the extent of directors' fiduciary

liability?

(C) Whether after the termination by a third party principal of the agency with the company, a director of the company had a fiduciary duty to the company qua that agency business?

(E) Whether the unwillingness of a third party to deal with a company and its willingness to deal only with a director of that company was a defence based on alleged diversion of business?

(F) Whether a director was liable to account to the company for profits made by him under an arrangement entered into independently by a third party with the director on account of his personal qualifications?

(ii). In **Company Appeal No.4 of 2004**, the main issue was Issue No.(C), which reads as follows:-

(C) As to whether the Company Law Board had jurisdiction under sections 397, 398 and 492 to direct a third party, who is not a shareholder or a director of the company, to render accounts and pay over amounts to the company for alleged diversion of business by one of the common directors?

(iii). In **Company Appeal No.5 of 2004**, the main issue was whether after arriving at the conclusion that Puris had breached the fiduciary duties, the Company Law Board ought not to have directed Seaworld to pay over all the benefits derived by it.

22. After framing the issues as above, the learned Judge proceeded to discuss the concept of fiduciary duties of Directors as existing in India and the finding given by CLB with respect to breach thereof by Puris. This discussion we find in paragraphs 21 to 31 of the judgment. Firstly, he referred to Section 88 and then to the judgment of the Apex Court in **C.G. Chetty vs. C.S.Chetty & ors. reported in AIR 1959 S.C. at page 190**. He noted that in para-14 of its judgment the Apex Court has dealt with the requirements to attract the second part of this section. Thereafter he observed that in his view the dictum in para 12 was relevant for our purpose wherein it is observed by the Apex Court that if in the facts of that case there had been a specific stipulation that the partnership business was to continue even after the expiry of 17 years (which was the term of partership therein), different considerations may have arisen. The learned Judge noted the observation of the Apex Court, that there was no absolute rule of law or equity that a renewal of lease by one partner must necessarily enure for the benefit of the other partners. The Judge also noted that the observations in later part of para-14 of that judgment

were emphasized by the Counsel on the part of Puris where the Apex Court observed that the partners in that matter were not on cordial terms and that there was hardly any room for importing the idea that they were occupying a fiduciary position apart from the fact that they were partners. The learned Judge, however, observed that those observations were in the facts of that case and that the renewal of lease was not obtained clandestinely in that matter. He then observed that whether the presumption of fiduciary relationship applied will have to be decided on the facts of this case.

23. The judgment in the case of **Deva Sharma vs. L.N. Gaddodia & ors. reported in AIR 1956 Punjab page 49** was cited before the learned Judge. The learned Judge however observed in para 25 that this decision has stated more or less the same principle as the one in Chetty's case (supra) while construing Section 88 of the Trust Act. According to him the fact situation in both the cases was more or less similar inasmuch as "the lease deed and the partnership were for a definite period for the purpose of carrying on the specific business and were co-terminous with the agency business which was also about to be terminated." He then referred to the judgment in **Benett vs. Gaslight and Coke Co. of London reported in (1882) 48 LT 156 (D)** referred in Deva Sharma's case which was a case of express trust and wherein it was held that the trustee was disqualified

from obtaining an agency to the prejudice of the trust. He noted that the last part of paragraph 39 in Deva Sharma's judgment was relied upon by Puris namely that if the agency could no longer be secured, the fiduciary relationship ended. However, what we find is that the learned Judge was impressed by the fact that the Puris have conducted themselves in secrecy. In paragraphs 27 to 30, the learned Judge noted that a number of judgments from English and American Courts were cited before him and also noted the submission of the Counsel for Puris that there was a marked difference between English and the Indian law. He noted the observations from American jurisprudence Vol.19 para-1313 to the effect that "a business opportunity ceases to be a corporate opportunity and becomes personal when the Corporation is definitely no longer able to avail itself of the opportunity." What we find however is that he has not gone into the full import of these propositions. He has then gone into the facts of the present case in para 31 and held that the conclusion reached by CLB against Puri group was fully supported by the pleadings.

24. Thereafter in paragraph 32 the learned Judge referred to the definition of "fiduciary duty" as appearing in Black's Law Dictionary, and relying on the discussion of the CLB in para 20 of its judgment, he held that there can be no hesitation in taking the view that Puri Group had breached its fiduciary duty. Para 20 of the judgment of the CLB held that Puris had

preplanned the event. They had preplanned the exercise of getting the whole agency to Seaworld. It referred to the fact that an agreement was entered into between Seaworld and Contship on 1st December 2001 and the service schedule was prepared on 14th December 2001. This para 20 also referred to the fact that one Viraf Bharucha had applied to the Registrar of Companies in Goa for incorporating a company in the name of Samrat Shipping & Logistics earlier. It was stated to be a company belonging to the group of SSTS and that promoters were Vaishnav Puri and Vishal Vaishnav Puri. ROC had approved the name on 11th January 2001 for a period of 6 months. Mr.Bharucha sought an extension by another 6 months. On 18th October 2001, he informed the ROC that he had no objection to the company being incorporated by other promoters and a form was filed appointing Vaishnav Puri and Vishal Puri as directors. The CLB has observed that the incorporation of the company proximate to the date of expiry of the agency agreement with SSTS also raises strong presumption that while acting as directors of SSTS and while the agency was subsisting with SSTS, Puris were planning to take away the Contship agency to Seaworld, which was in breach of the fiduciary duty to SSTS.

25. In para 33 of his judgment, the learned Single Judge accepted the argument on behalf of Sippys that the two companies SSCO and SSTS were essentially glorified partnerships and the court will be obliged to examine

the matter as a bystander and apply the objective tests of whether the acts of Puri Group caused unfair prejudice to the Sippy Group and the two companies. Thereafter the learned Judge referred to Palmer's Company Law on the general test for unfair prejudicial conduct, namely that it should be that of a reasonable bystander, and then Pennington's Company Law for what is oppressive conduct, and then Gore-Browne on section 210 of the English Company Law. He referred to the general duty of partners to have utmost good faith and honesty as recorded in Lindley & Banks on Partnership. Thereafter in the later part of para 37, the learned Judge held that applying the standards applicable to partners of any partnership firm, it will have to be held that Puri Group committed breach of its fiduciary duties to SSTS and SSCO. Lateron, in para 38, he observed that no attempt was made by Puri Group to persuade Contship to continue the arrangement with SSTS even though they continued to be the managing director and director of SSTS.

26. Thereafter in para 40, the learned Judge referred to the judgment of House of Lords in **Scottish Cooperative Wholesale Society Ltd. v. Meyer reported in (1958) 3 All E.R. 66** to the effect that if a partner starts a business in competition with the business of the partnership without the knowledge and consent of his partner, he acts contrary to the doctrine of utmost good faith and his conduct can be regarded or oppressive to

his partners. The affairs of a company would be conducted oppressively by the directors just as they can conduct its affairs oppressively by doing something injurious to its interests when they ought not to do it. He then referred to Indian judgments on the concept of oppression in the case of Shanti Prasad Jain v. Kalinga Tubes Ltd. - (1965) 35 Company Cases 351, Needle Industries (I) Ltd. v. Needle Industries Newey (India) Holding Ltd. - (1981) 51 Company Cases 73 and a few other judgments.

27. In para 46, the learned Judge observed that the fact that Contship terminated agency of SSTS or that the agency agreement was not subsisting on 1st December 2001 is of no consequence and cannot be the sole basis for answering the issue of fiduciary obligations and duty of Puri Group. In para 49, he held that sections 397 and 398 cannot be given restricted meaning and wherever required the appropriate directions can be given, and in para 51, he held that no fault can be found with the CLB for issuing such directions.

28. The learned Judge, therefore, dismissed Appeal No.1 of 2004 filed by Puri Group as also Appeal No.4 of 2004 filed by Seaworld, and allowed Appeal No.5 of 2004 filed by Sippy Group by a common judgment and order dated 23rd February 2004. The direction by the CLB to account for the benefits for a limited period was set aside in Appeal No.5 of 2004, but was substituted by a

direction to account for the benefits until Puris purchased the shares of Sippy Group in SSTS or till the agency of Seaworld with Contship is terminated.

29. (i) The order on Company Appeal Nos.1 and 4 of 2004 has led to the Puris and Seaworld filing present Appeal Nos.359 and 468 of 2004 under the Letter Patent. The order on Company Appeal No.5 of 2004 has led to Puris and Seaworld filing present Appeal Nos.369 and 469 of 2004 under the Letter Patent. We will deal with the submissions of the Counsel for the parties on all these appeals together since all of them arise out of Company Petition No.41 of 2002.

. (ii) Company Appeal No.2 of 2004 arising out of Company Petition No.40 of 2002 was also dismissed in part with this common judgment. That has led to filing of Appeal No.358 of 2004 by Puris under the Letter Patent. Company Appeal No.2 of 2004 was, however, entertained by the learned Single Judge to a limited extent in the sense that the claim of Sippys for interest on account of alleged delay in repayment of Rs.49 Lakhs by Puris as alleged by Sippys was held unfounded. The direction given by the CLB to pay interest thereon was, therefore, set aside. Though this part of the order is against the Sippys, they have not challenged the same. We will deal with that appeal separately. We will deal with Company Petition No.40 of 2002 at that time.

30. All these appeals are admitted and heard together for final hearing.

31. **Notice of Motion No.1706 of 2004** has been taken out by Puris in Appeal No.359 of 2004 for stay of the judgment of the Single Judge. The Motion has been pending without any order therein.

32. **Notice of Motion No.1705 of 2004** has been taken out by Puris in Appeal No.358 of 2004. Prayer (a) of the Motion is for the stay of the judgment of the single Judge. Prayer (b) is for appointment of Liquidator to take charge assets of SSCO and Meridian listed in the supporting affidavit. This Motion is also pending without any order therein.

33. **Notice of Motion No.892 of 2005** has been taken out by Puris in Appeal No.358 of 2004. Prayer (a) for the Motion is for Receiver and Liquidator for SSCO. This motion is also pending without any order therein.

34. (i) **Notice of Motion No.391 of 2005** has been taken out by a third party Hewlett Packard India Sales Pvt. Ltd. The applicant of this motion is in possession of office premises situated on the 2nd floor of a building by name "Metropolitan" situated at Bandra-Kurla Complex, Mumbai with two covered and two open car parking places. These premises belong to SSCO

and the applicant has executed an agreement on 29.10.1997 with SSCO by keeping an interest free deposit of Rs.Four Crores for getting the possession of these premises.

(ii) It is the case of the applicant that it is no longer in need of those premises. It gave a notice of termination of the agreement dated 31.10.2002. It seeks to return the premises to SSCO and get back its deposit, but the notice given by the applicant has not been complied with due to the disputes between Puris and Sippys. Mr.Vaishnav Puri has filed a reply and referred to the Minutes of understanding arrived at between the applicant on one hand and the Puris and Sippys on the other on 23rd July 2004 wherein it was agreed to sell the properties of SSCO and Meridian and to return the amount of Rs.Four Crores to the applicant. It is stated that Puris are agreeable to maintain this understanding but Sippys are not. Sippys have not filed any reply. This Motion is also pending without any order.

35. All these Motions are being heard and decided along with these Appeals.

36. Mr.Chenoy, learned Counsel appearing for the Appellants, submitted that the conduct of Puris in setting up another company, which has now come up to be known as Seaworld, has been the main factor which has weighed on the CLB and on the learned Single Judge. The

learned Single Judge has time and again referred to para 20 of the judgment of the CLB, wherein it is noted that the notice of termination of the agency by Contship dated 1st September 2001 was not brought to the notice of Sippys by Puris. From 22nd December 2000 and all throughout the year 2001 steps were taken to float another company at Goa through one Viraf Bharucha without informing Sippys and wherein Puris joined on 18th October 2001. Entering into the agreement with Contship by Seaworld immediately thereafter on 1st December 2001 has also impressed the CLB as well as the learned Single Judge. Mr.Chenoy, however, pointed out that on the other hand, the fact that there were pre-existing disputes between the parties is clearly borne out from the pleadings. As seen from the affidavit in reply of Puris and the rejoinder thereto by Sippys, it is clearly placed on record that from early 2000 there were disputes between the parties. There was an allegation of Puris that large amounts were being diverted from SSTS to Meridian. By 2000-2001, approximately Rs.9.5 crores had been advanced by SSTS to SSCO and from that Rs.4 crores were diverted to Meridian. Puris had refused to sign the accounts of Meridian initially. Puris were assured that they will be relieved from their personal guarantee, but that was not done. In para 5.3 of the reply, it was specifically stated that by 2001, good amounts of SSTS was locked up in SSCO / Meridian. It was affecting the cash flow of SSTS and its ability to duly and timely make the

payments to Contship. There was no specific rejoinder to all these averments. All that is stated in para 38 of the rejoinder is that assuming these allegations were correct, that did not entitle Puris to indulge in illegal actions. Mr.Chenoy pointed out that all throughout from December 2001, there were efforts to mediate and if reconciliation was not possible to separate amicably. These factors could not have been ignored by the CLB or by the learned Single Judge. The submission was that it clearly showed that parties no longer had any confidence in each other and their relationship was already strained.

37. It was further submitted by Mr.Chenoy that one more important factor ought to be noted, namely that Contship had specifically stated in their affidavit that they had all throughout dealt only with Puris, and that was so far nearly 20 years and that was much prior to Puris joining into SSCO and bringing in the agency business with Contship. A responsibility is cast by the CLB and the learned Single Judge on the Appellants that they did not persuade Contship to continue the relationship with SSTS, but nothing is placed by Sippys on record to show that after 7th December 2001 they made any correspondence or efforts to persuade Contship. The submission of Mr.Chenoy was that the agency business had been terminated by Contship. Once that was so terminated, there was no question of any obligation on Puris that they should not engage into independent

relationship with Contship. Mr.Chenoy submitted that the relationship of Puris with Contship was of their own and not because of Vaishnav Puri being a director of SSTS. He pointed out that Contship had terminated its agency with SSCO in the past also. Besides, for alleging any collusion between Contship and Puris and establishing such collusion, Contship ought to have been retained as a party Respondent, but it had been permitted to be deleted from the proceedings. No finding could therefore be arrived at to the prejudice of Puris on such a background. Mr.Chenoy submitted that SSTS had no longer any corporate opportunity and the learned Judge erred in applying the test of **Benett v. Gaslight & Coke Co. of London** reported in **(1882) 48 LT 156**. He substantiated his arguments with a number of judgments which we will separately deal with.

38. The submissions of Mr.Chenoy have been countered by Dr.Tulzapurkar, learned counsel appearing for Sippys. He submitted that the entire conduct in floating another company throughout the year 2001 was a clear indication of malafide intentions of Puris. The earlier disputes had arisen between the Sippy Group and Jaising only on the use of the word "Samrat", and now the same word was sought to be used for another private company which was clandestinely set up by Puris in Goa. After coming to know about setting up of this new company and shifting of the agency business to it, Sippys tried to persuade Puris to come to a negotiating

table but the Puris declined the suggestion. Ultimately, when suits were filed, Puris obstructed by submitting that Sippys could not file suits in the name of SSTS or SSCO. The whole attempt was to take away the goodwill of the name of Samrat.

39. He submitted that the disputes with respect to Meridian were an after-thought and were not raised till 10th December 2001. It was a bogie to avoid holding of meetings and bogus grounds were used as to who should preside over the meetings etc. The entire conduct of Puris was in breach of their fiduciary responsibility. In his submission, the relationship between the parties were that of partners in a glorified partnership and the decision of the CLB as also the learned Single Judge could not be faulted. There was a deadlock, but the proper remedy was to issue directions in the nature they were issued and not winding up since the main business of the company had already been diverted by Puris. He emphasised the observations in Pennigton's Company Law, 7th Edition at page 885 that Court's jurisdiction in such matters is equitable in character although originating in a statutory provision. He substantiated his arguments with a number of judgments which we will separately deal with.

40. **The points, which arise for our determination** in these appeals, are principally as follows:-

. (i) whether the diversion of Contship agency from SSTS to Seaworld amounted to a breach of fiduciary duty on the part of Puris as Directors as referable to Section 88 of the Indian Trust Act?

OR

. whether on account of the termination of the agency of SSTS by Contship, SSTS no longer had a corporate opportunity and, therefore, there was no such breach of fiduciary duty by Puris ?

. (ii) whether the alleged conduct of Puris amounted to oppression of Sippys within the meaning of Section 397 or that it led to mis-management of SSTS and SSCO within the meaning of Section 398 of the Companies Act?

. (iii) whether any such findings and directions based thereon given by the CLB and as sustained and/or modified by the learned Single Judge were warranted?

41. **The relevant sections** :

. When we deal with the first point and the rival submissions thereon, it will be appropriate to refer to **section 88 of the Indian Trusts Act** which lays down that the advantage made in fiduciary capacity has to be made good. This section reads as under:-

"**88. Advantage gained by fiduciary.**- Where a

trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

The relevant sections of Companies Act are Sections 397, 398 and 402. They read as follows:-

" **Application to Tribunal for relief in cases of oppression**

397. (1) Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Tribunal is of the opinion -

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

Application to Tribunal for relief in cases of mismanagement.

398. (1) Any members of a company who complain-

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or

(b) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alteration in its Board of directors or manager or in the ownership of

the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company;

may apply to the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Tribunal is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Tribunal may, with a view to bringing to end or preventing the matters complained of or apprehended, make such order as it thinks fit.

Powers of Tribunal on application under section 397 or 398

402. Without prejudice to the generality of the powers of the Tribunal under section 397 or 398, any order under either section may provide for-

(a) the regulation of the conduct of the company's affairs in future;

(b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely-

(i) the managing director,

(ii) any other director,

(iii) and (iv)

(v) the manager,

upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in all the circumstances of the case.

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under section 397 or 398, which would, if made or done by or against an

individual, be deemed in his insolvency to be a fraudulent preference;

(g) any other matter for which in the opinion of the Tribunal it is just and equitable that provision should be made."

42. **Submissions of Mr.Chinoy, learned Counsel for Puris**:

(i). Mr.Chinoy submitted that if Sippys wanted to make out a case that Puris gained unfair advantage by breach of their fiduciary responsibility they will have to make out a case either under the first part or the second part or both of Section 88 of the Trusts Act. As far as the first part is concerned, it is necessary to establish that the parties were bound in fiduciary character and such element of confidence did exist between them at the time when a complaint is made by one of the parties. Secondly, it must be shown that the defendant has, by availing of his character as a director, gained for himself any pecuniary advantage. As far as this aspect is concerned, he adopted the interpretation of first part of Section 88 in paragraph 32 of the judgment of Falshaw, J. in Deva Sharma’s case (supra) namely that this benefit must accrue when the person concerned is dealing with third party and poses himself as a director of the Company. Surely, such an occasion cannot arise after the termination of the agency as held in that case. That apart, he submitted

that in the present case there was a clear material on record which shows that the disputes had started between the parties much earlier and that they had made the lists of the properties for their separation also. Thus, there was hardly any element of confidence left between them as in Deva Sharma's case and C.G. Chetty's case.

(ii). Besides, there was no question of Puris gaining advantage by posing as directors of SSTS after the termination of the agency. He pointed out that Contship came first to SSCO and then to SSTS because of Puris. It was the business of Puris with Contship which was being run through SSTS. In the letter dated 26th April 2002 Contship described Puris as Contship men in India. Even CLB in para-4 of its judgment accepted this position when it observed as follows:-

> " ..... The admitted position is that the second respondent (i.e. V.S. Puri) has always been managing the affairs of SSTS as a M.D. and Sippys never interfered with the working of the company."

Even when Contship applied for being deleted from the proceedings it clearly stated in paragraph (vii) of its application that the applicant (Contship) company never had dealings with any other person in any matter. It had always dealt with Mr.V.S. Puri. It also stated

that the proceeding was more to harass the applicant-company and as a pressure tactics against Mr.V.S.Puri. This contradicts the statement of Sippys in paragraph 46 of their rejoinder dated 9.9.2002 wherein they have stated as follows:-

> " I deny that Contship is today aware of the personality of the companies with whom it is doing business or the question of Contship being misled in any manner cannot or does not arise."

(iii). Mr.Chinoy thereafter pointed out that Sippys initially pleaded that Puris had misrepresented to Contship. In para-40 of their rejoinder they had contended that Puris had misrepresented to Contship that the new company set up by them viz. Sea World belonged to Samrat group. Mr.Chinoy, therefore, submitted that if Contship were to suffer a misrepresentation they would be an ignorant party. On the other hand Contship has taken a clear stand to support Puris and apart from justifying the termination of agency with SSTS they have specifically stated in the affidavit that in the changing scenario of globalization it was considering various options in continuing its business in India either through Mr.V.S.Puri or otherwise. The affidavit specifically referred to the clause in the agreement providing for termination and that it had been terminated accordingly. Therefore, the question of

misrepresentation does not arise.

(iv). Mr.Chinoy submittded that on the other hand, in the proceedings before CLB as also before the learned Single Judge it was however argued by Sippys that it was a case of collusion and conspiracy. Mr.Chinoy submitted that such a plea could not survive once Contship was deleted as a respondent and the rigours of Order VI Rule 2 of the Code of Civil Procedure, 1908 will apply. Yet in the absence of Contship, the CLB had held that there was a conspiracy and that there was a pre-planned effort by Puris towards the same. In his submission, the same view of the learned Single Judge was also erroneous. He, therefore, submitted that there is no question of the conduct of Puris being hit by the first part of Section 88 of the Trusts Act.

43. As far as the second part of Section 88 of the Trusts Act is concerned, it requires that the defendant had entered into dealings in which his own interests were adverse to those of the erstwhile company or partnerships. For that purpose it was necessary to show that SSTS continued to have the business opportunity to deal with Contship. Once Contship terminated its agency with SSTS the business opportunity ceases to be a corporate opportunity for SSTS. For this purpose he relied upon the conclusion reached by Falshaw, J. in Deva Sharma’s case quoted above that when a benefit can no longer be secured on behalf of a partnership the

fiduciary relationship ends and the individual partner is free to look after his own interest and even to secure the benefit for himself.

44. Mr.Chinoy submitted that the principle of opportunity being made available to the partnership would apply at an initial stage or during the continuation of a contract. However, once the contract is terminated or it expires, the business opportunity comes to an end. Contship could not be restrained from taking any such decision and Puris could not dictate to Contship what it should do. He pointed out that the decision relied upon by the CLB viz. the judgment of Messachusets Court of Appeal in **Energy Res. Corporation vs. Porter reported in 438 NE 2d 391** was the case of initial offer and opportunity.

45. Mr.Chinoy pointed out the English judgment in the case of **Keech vs. Sanford reported in SC2 Wh & TLC 693** relied upon by the CLB and Sippys laid down the principle of absolute confidence which applied in the case of express trust. That was a case where the lease of a market was devised towards the trustee for the benefit of an infant. Before expiry of the lease the lessor refused to renew it in favour of the infant and the trustee took it for himself. It was held that the trustee was obliged to convey it to the infant and account for the profits. Mr.Chinoy commented that the legal duty or liability of a partner securing a contract

or a benefit personally was distinct from that of a trustee of an express trust. The proposition in this case was followed in **Industrial Development Consultants vs. Cooley reported in (1972) 2 All England Report 162** and in **Bhullar vs. Bhullar reported in (2003) EWCA page 424.** The English law on this question is that whether or not the benefit would have been obtained but for the breach of the trust is irrelevant. In the submission of Mr.Chinoy, the law in India is not the same as in England as laid down in C.G. Chetty's case as also in Deva Sharma's case. The principle of absolute liability is not accepted in these judgments.

46. On the other hand, Mr.Chinoy drew our attention to a few judgments from the Courts in U.S.A. and submitted that they were more apposite while considering the problem before us. The significant from amongst them are the following:-

(i). **Fred Diedrich vs. John Helm by the Supreme Court of Minnesota decided on 2nd June 1944 reported in 217 MINN page 483.** The Court held therein that a Corporation can have no interest or expectancy where the opportunity is not available to it either because of a party refuses to deal with it or because the Corporation sought it without success to obtain. In such a situation a business opportunity is no longer a corporate opportunity.

(ii). **Urban Alexander Company vs. Trinkle, the judgment of Court of Appeal of Kentucky reported in 311 K.Y. 635 decided on 2nd December 1949.** This is also to the same effect namely that the opportunity ceases to be a corporate opportunity and becomes personal when the Corporation is no longer able to avail itself of the opportunity.

(iii). The earlier referred view of the Minnesota Supreme Court is followed and reiterated by the U.S. District Court of Minnesota in **Luigino Inc. vs. Robert Peterson decided on 28.1.2002 reported in (2002) U.S. Dist. Lexis 1465.**

(iv). In **Mau Inc. vs. Human Technologies Inc.** decided on 4th August 2005 the Court of Appeal of Georgia laid down a two-step process to decide the question whether there is a wrongful appropriation of a business opportunity. This is reported in **274 Ga. App. page 891**. The test is as follows:-

> " First a court must determine whether the appropriated opportunity was in fact a business opportunity rightfully belonging to the Corporation. If a Court finds that business opportunity was not a corporate opportunity, the directors or officers who pursued the opportunity for personal benefit are immune from the liability."

The Court also held that burden of proof rested upon the party attacking the acquisition.

(v). Similar view is taken in **Robert Broz and RFB. Cellular Inc. vs. Cellular Information Systems, Inc.** decided by the Supreme Court of Delaware on 22.3.1996 and reported in **(1996) DEL Lexis 105**. In this judgment the Court held that the defendant-Broz was under no obligation to formally present the corporate opportunity to the CIS Board of Directors. Though presentation of such an opportunity may serve as a shield to a liability but there is no per se rule requiring such presentation, and then the Court observed as follows:-

> " Of course presenting the opportunity to the Board creates a kind of **safe harbour** for the director. ..... It is not the law of Delaware that presentation to the Board is a necessary pre-requisite to a finding that the corporate opportunity has not been usurped."

47. In the facts of the present case, Mr.Chinoy submitted that Sippys came to know about the termination of the agency of SSTS on 7th December 2001. They have not written a single letter to the Contship asking it to continue its agency with SSTS. They have not been able to contradict the assertions of Contship by showing any document that Contship was all throughout dealing with

Puris only. A grievance is made that Puris did not disclose the letter of termination to Sippys. It is submitted therefore that in any case on 7th December 2001 Sippys had come to know about it but have taken no steps to challenge the termination or to request Contship to continue the agency. They resorted to a passing off action to begin with and thereafter filed the proceedings under Sections 397 and 398 of the Companies Act after seven and half months in July 2002 when the agency with Sea World had already become operational. As far as the letter of termination being received by Puris is concerned, it was submitted that all correspondence by Contship was being received at the same address where the termination letter was received. It was not specifically sent to that address. It was further submitted that at the time of incorporation of SSTS the registered office of SSTS was at Puris' personal office. Subsequently Puris were the people dealing with Contship and therefore they received a letter of termination. Non-disclosure of that letter can, at the highest, be criticized as the breach of duty to disclose but that cannot take away the fact of conscious termination of agency by Contship. Mr.Chinoy therefore submitted that the business opportunity was no longer available to SSTS. It ceased to be a corporate opportunity for it. Therefore as per the dicta in Deva Sharma's case if Puris treated it as a personal opportunity they could not be faulted and their actions could not be hit by the second part of Section 88 of the

Trusts Act. It could not be said that Puris had obtained an interest adverse to that of SSTS since the opportunity was no longer available to SSTS.

48. **Submissions of Mr.Doctor** :

(i). Mr.Doctor appeared for Sea World in Appeal Nos.468 and 469 of 2004 to challenge the order passed in Company Appeal Nos.4 and 5 of 2004. He submitted that the proceedings filed by Sippys were with respect to SSTS and the alleged opression of Sippys by Puris therein. In his submission, CLB had no jurisdiction to pass the order against Sea World to pay its profits to Sippys. Sippys had no shares in Sea World and Sea World had no connection with SSTS. He therefore submitted with respect to the third point of determination that whatever may be the order against Sippys with respect to SSTS, no order could be passed against Sea World to make good the profit earned by it allegedly at the expense of Sippys. He criticized the learned Single Judge for having gone to the extent of saying that there cannot be any limitation for the relief to be granted under Section 402 of the Companies Act. He relied upon a judgment of the Division Bench of this Court in **Shanti Prasad Jain vs. Union of India reported in 75 BLR 778 at 811** to point out that a scope of proceedings under Section 397 is essentially concerning the Company in dispute and not other Companies. He adopted the submissions of Mr.Chinoy but stated that even if the

Appeal of Mr.Chinoy fails, the order could not be maintained against Sea World.

49. **Appeal No.358 of 2004** (arising out of the decision in Company Appeal No.2 of 2004 and Company Petition No.40 of 2002) **and submissions of Mr.Chagla, learned Counsel for Puris**:

(i). Mr.Chagla pointed out that Company Petition No.40 of 2002 was filed by Sippys on 1st July 2002 and the sole act of opression and/or mis-management alleged therein was with respect to the NOL transaction which had taken place some ten years earlier in 1992. In the reply of Puris, it was pointed out that this NOL which was a Company from Singapore, set up a joint venture in India with Puris alone. Puris took a loan of Rs.49 Lakhs from SSCO to buy the shares in the joint venture **Company. This loan was sanctioned by a resolution of** the Board of Directors of SSCO passed on 15.10.1992 and it was signed by Mr.Kundan Sippy. The resolution noted that NOL was entering into the joint venture with Puri alone in his individual capacity and the same was permitted and an interest free loan of Rs.49 Lakhs was given to Puri. This joint venture was mutually ended in 2000. Puri sold the shares for Rs.2.93 Crores and repaid the loan of Rs.49 Lakhs. That was also approved by the Board of SSCO by its resolution dated 8th May 2000 which was also signed by Mr.Kundan Sippy. The agreement for sale of the shares and the transfer forms were also signed by Mr.Kundan Sippy as witness. The

return of Rs.49 Lakhs has been duly reflected in SSCO's account ending 31st March 2001 which is also signed by Mr.Kundan Sippy. Yet an allegation of not returning the amount has been made which according to Puris is false to the knowledge of Sippys.

(ii). It was pointed out by Mr.Chagla that CLB therefore specifically noted in paras 10 to 14 of its judgment the submissions of Puris that Sippys had not come with clean hands and had suppressed the facts known to them. In para 24 CLB did give the finding accordingly and also that Mr.Kundan Sippy had not denied his signatures on the above-referred documents. In spite of that CLB directed Puris to pay interest at the rate of 12% on the amount of Rs.49 Lakhs which it considered as due for the delay in repayment on equitable considerations. The CLB gave one more direction which was with respect to exchange of shares of SSCO also.

(iii). Puris filed Appeal No.2 of 2004 under Section 10F of the Companies Act challenging the directions to pay the interest and also the direction to buy the shares of each other to take the respective Companies. As far as the first direction is concerned, the learned Single Judge did note in para 8 of his judgment that the finding of CLB viz. that Sippys had not come with clean hands was a finding of fact which had not been challenged before him. The direction to pay interest

could not therefore be sustained and the learned Single Judge set it aside. The Sippys have not challenged this part of the order.

(iv). Once a finding is given that the party concerned had not come with clean hands, the petition ought to have been dismissed. The learned Single Judge, however, maintained the second direction and observed in para 49 of his judgment that in his understanding CLB had found that there was opression of Sippy group and mis-management in the affairs of the Companies and therefore that direction had been given. Reliance was placed by Mr.Chagla on a judgment of Single Judge of Karnataka High Court in **S.D.N. Wadiyar vs. Sri Venkateshwara Real Estate P. Ltd. reported in 72 (1991) Company Cases page 211** to the effect that the question of good faith has to be tested by the conduct of the petitioner not only in the particular proceedings but also in parallel proceedings in civil courts. Mr.Chagla, therefore, submitted that both the petitions ought to have been dismissed. Yet apparently on the basis of the allegations in Company Petition No.41 of 2002 concerning SSTS, the direction for exchange of shares has been maintained in Company Petition No.40 of 2002 which is erroneous, since apart from the NOL controversy there was no separate allegation of opression or mis-management concerning SSCO. Mr.Chagla submitted that, in any case, Company Petition No.40 of 2002 ought to have been examined independently on its

own merits and dismissed. For that purpose he relied upon the following observations of the Apex Court in **para 217 of Sangramsinh Gaekwad vs. Shantadevi, reported in 123 Company Cases** -

> " For the purpose of grant of relief, the High Court could only consider the pleadings filed in Company Petition No.5 of 1991. If no relief could be granted having regard to the pleadings contained therein, it is inconceviable in law that such relief would be granted on the basis of the pleadings made in other proceedings and totally ignoring the admissions made by Respondent No.1 herein in the proceedings initiated by her."

(v). It was pointed out by Mr.Chagla that a mere deadlock cannot be a ground for granting relief under Section 397 and 398 of the Companies Act, though it may result into a winding up of a company on the ground of being just and equitable as observed by the Apex Court in para 32 of **Hind Overseas Pvt. Ltd. vs. R.P. Jhunjhunwalla reported in AIR 1976 SC 574**. As held in para 19 of S.P. Jain vs. Kalinga Tubes, AIR 1965 SC page 1543, a finding of opression and mis-management was a pre-condition for granting reliefs under Sections 397 and 398 of the Companies Act. This view is followed by various High Courts e.g. Calcutta High Court in the case of **Modern Furnishers Pvt. Ltd. reported in 58**

(1985) Company Cases 558.

(vi). Since Company Petition No.40 of 2002 was entertained on the basis of the allegations in Company Petition No.41 of 2002, Mr.Chagla dealt with the second point for determination. He pointed out that the English judgments relied upon in support of Sippys by Dr.Tulzapurkar were based on the words "unfairly prejudicial" added in the English law. Section 397 of the Indian Companies Act was almost on the same line as Section 210 of the English Act. In England the term "opression" in Section 210 came to be substituted by the words "unfairly prejudicial conduct", to make it clear that it was not necessary to show the act "complained of" was illegal. Such an amendment has not been accepted in India and our section has not been altered. Therefore the concepts of unfair prejudicial conduct act could not be brought in while interpreting Section 397 of the Indian Companies Act.

50. **Counter by Dr.Tulzapurkar appearing for Sippys**:

(i). Dr.Tulzapurkar, learned Counsel appearing for Sippys, submitted that one has to look to the entire controversy from the point of view of a bystander. He, for that purpose, referred to a passage from Palmer’s Company Law 24th Edition Vol.I page 993. The learned author holds that the general text for unfair prejudice has to be an objective one and not a subjective one

namely as to what a reasonable bystander observed the consequences of the conduct would regard it. In his submission, if a third party is to be set up a company with the name Samrat, Sippys and Puris would have surely filed a joint action. In the present case, Puris sent their employee one Mr.Bharucha to Goa to float a company in the name of Samrat Logistics on the Registrar of Companies pointing out that the name Samrat was registered and a no objection was required. Puris gave the no objection on behalf of SSTS on 10.1.2001. This was not disclosed to Sippys. This very Mr.Bharucha later-on withdrew from this proposed company and allowed Puris to become the main directors of Samrat Logistics. In his submission, the Jaisingh family had walked out of his business and were compensated with the clear understanding that they will not use the name Samrat. Surely if such a company was to be floated by a third party, Sippys and Puris would have jointly taken necessary steps.

(ii). Dr.Tulzapurkar drew our attention to the correspondence leading to the filing of the Company Petition. He pointed out that only on 11th December 2001 Puris had raised the disputes with respect to meridian and as to how Sippys were responsible for the financial difficulties of meridian. That was only a few days after Sippys came to know of Puris setting up of a new company and diverting Contship agency to it on 7th December 2001. In his submission this was nothing but a

bogie being raised. He pointed out that Sippys had asked Puris to file a Suit against Samrat Logistics. But Puris continued to create difficulties. He pointed out that the following factors show the breach of trust by Puris:-

> "(i) Proceeding to set up Samrat Logistics in Goa in a clandestine manner.
>
> (ii) Objecting to the filing of the suit.
>
> (iii) Not holding any meeting when such a proposal was moved.
>
> (iv) Raising the bogie of Meridian at a later point of time.
>
> (v) Persuading Contship to take away the business of agency from SSTS and giving it to Samrat Logistics (now Samrat Sea World).
>
> Dr.Tulzapurkar pointed out that at page 26 of the petition this entire submission is with respect to registration in Goa and the tactics used amounting to breach of fiduciary duty have been raised and in para 20 of the CLB judgment, a finding has been given that there is a breach of the fiduciary duty."

(iii). Dr.Tulzapurkar submitted that the two companies were nothing but glorified partnerships. Therefore, fiduciary principles in a partnership will have to be applied. If the reliefs which are prayed are not granted on the ground that the remedy under Section 433(f) of the Companies Act namely winding up is available, it would cause injustice to Sippy group and the purpose of protecting opposite group would suffer.

(iv). Dr.Tulzapurkar criticized the fact that the termination letter dated 1st December 2001 was not disclosed to the Sippy group nor any meeting was called to discuss the effect thereof. Puris on the other hand proceeded to shift the business of Contship agency to their own new comer. This was nothing but a breach of fiduciary duty as directors under Section 88 of the Trusts Act. They had availed of their position as directors of SSTS to grow in the business and now they were trying to walk out with a cream thereof.

51. Dr.Tulzapurkar relied upon the judgment in **Scotland Co-operative Wholesale Society vs. Meyer** reported in **1953 (3) All England Report page 66 and Keech vs. Sanford reported in 25 English Report 223** in support. He submitted that in a quasi partnership the relationship had to be looked at as that of trustees. In a conflict between duty and interest it is duty which had to be given preference.

An analysis of 3 leading Indian cases :

52. Two Indian cases were emphasised by both the counsel for interpreting Section 88 and its application to the present case viz. (1) C.G. Chetty vs. C.S. Chetty - AIR 1959 SC 190 and (2) Deva Sharma v. Laxmi Narain Gadodia - AIR 1956 Punjab 49. We will have to discuss them in details.

53. (i). In **C.G. Chetty v. C.S. Chetty - AIR 1959 SC 190**, the provisions of section 88 of the Trusts Act, 1882 came to be considered by the Apex Court. Section 88 provides amongst others that where a director of a company bound in a fiduciary character to protect the interest of another person gains for himself any pecuniary advantage by availing himself of his character or where he enters into any dealings under circumstances in which his own interests are adverse to those of such other persons and thereby gains for himself a pecuniary advantage he must hold the advantage so gained for the benefit of such other persons. In Chetty v. Chetty, the facts were this wise. The Madras Government put up for auction for a period of 17 years the lease of a salt factory. Five persons entered into an agreement and gave a bid on an understanding that if the sale was confirmed in favour of any one of them they would enter into a partnership to run the business in certain shares in proportion to the amount contributed by them. Two of them jointly made a successful bid and the sale was confirmed in their favour. They continued to function the partnership during the period of the lease in

accordance with the agreement. Two of the partners died, but their sons became partners in their place.

(ii). A few months before the expiry of this lease, the salt department made inquiries about the renewal for a further period of 25 years. The renewal of the lease was granted in the name of one of the original successful bidders and the sons of the other who had taken his place. The lease had been renewed in favour of the same lessees partly because it was reported that they had worked to the satisfaction of the department. However, shortly before the expiry of the earlier lease, the partners in whose names the lease had been renewed sent notices to the other partners for the settlement of the accounts upto the date on which the old lease was due to expire. They did not mention in the notice that the lease had been renewed. The partners, who were sought to be excluded, filed a suit against those who had obtained a renewed lease in their own name. The question came up as to what interest did the excluded partners have in the renewed lease. A Division Bench of the Madras High Court (in **AIR 1949 Madras 860**) took a view that the new lease must be held by the partners who had obtained it for the benefit of the other members of partnership.

(iii). The judgment was reversed by the Apex Court in C.G. Chetty v. C.S. Chetty (AIR 1989 SC 190). The Apex Court held that if the case was to be brought under

first part of section 88, it had to be shown that the contesting defendants had a fiduciary character and were duty bound to protect the interest of the other partners in the matter of obtaining the lease and that they had obtained it instead for themselves by availing themselves of that character. The Court noted that according to the Madras Government, the personal conduct of the lessees was the determining factor in the grant of the fresh lease. The contesting defendants had managed the factory well and to the satisfaction of the revenue, therefore they were able to obtain the fresh lease. In para 13 of the judgment, the Apex Court held that therefore it cannot be said that they had availed themselves of their character as partners in obtaining the renewal.

(iv). In para 14 of the judgment, the Court examined as to whether the plaintiffs had made out a case in terms of the second part of section 88. The Court noted that for that purpose it had to be shown that the contesting defendants while obtaining renewal of the lease had placed themselves in such a position as to render their interest adverse to those of the other partners and had thereby obtained the pecuniary advantage. The Court held that if the plaintiffs had established that any funds or goodwill of the alleged firm name had been utilised for obtaining the renewal of the lease, the case could have come directly under illustration (d) under the section. The Court also held

that illustration (e) under the section did not apply because the defendants were not negotiating for renewal on behalf of the entire body of partners. The Court noted that the suit was filed months before the new lease was actually granted, but lease by itself had no value unless it was followed by licence to manufacture and sale of salt which was granted some two years and 4 months after the expiry of the previous lease.

(v). Later, in para 14, the Court observed "This is a business in which the personal factor of the persons in charge of managing the business is more important than anything else." Thereafter the Court noted "Another important matter which has a bearing on the case has also to be adverted to. Between the years 1939 and 1942, that is to say, during the last three years of the terms of the partnership, the partners were not on cordial terms and there does not appear to have been much of confidence between them. They had already started quarrelling and attributing unworthy motives. There is, therefore, hardly any room for importing the idea of such confidence amongst partners as would render the contesting defendants occupying a fiduciary position, apart from the fact that they were partners."

(vi). In para 15, the Court noted that the partnership stood automatically terminated at the end of 1942. The Actual grant of the lease in question as made in April 1943, and the permanent licence to manufacture

and sell salt was granted only in 1945. Later, the Court observed "The fiduciary character as between the partners had ceased on the termination of the original lease and of the partnership business. On such a termination, there was no interest of the partners which the contesting defendants were bound to protect. The Court therefore held that the plaintiffs had failed to bring the case strictly within the terms of section 88 of the Indian Trusts Act.

(vii). The Court then noted that the Indian Legislature had substantially adopted the English Law while enacting the rules laid down in sections 88 and 90 of the Indian Trusts Act. It examined some of the English precedents which were cited and then observed in para 17 as under:-

> "On a close examination of the English precedents aforesaid, it will be found that there is no absolute rule of law or equity that a renewal of a lease by one partner, must necessarily enure for the benefit of all the partners. There is a presumption of fact, as distinguished from a presumption of law, that there is an equity in favour of the renewal of the lease enuring for the benefit of all the partners. But such a presumption being one of fact, is rebuttable, and must, therefore, depend upon the facts and circumstances of each

case."

Thereafter the Court held that the facts and circumstances amply rebut any presumption of fact that the lease should enure to the benefit of all the parties.

54. (i). In **Deva Sharma v. Laxmi Narain Gadodia - AIR 1956 Punjab 49**, a question came up before the Division Bench of Justice Khosla and Justice Kapur of the Punjab High Court as to whether section 88 applied to the facts of that case. On a difference of opinion between the two Hon'ble Judges, the matter was referred to a third judge Falshaw J., whose judgment is reported in the above report. British India Corporation Ltd. was the owner of a number of enterprises including the Kanpur Cotton Mills Co. By an agreement dated 20th March 1937, it appointed M/s L.N. Gadodia & Co. as the selling agents for the sale of all yarn and cloth produced by the mills upto 1st December 1937. Laxmi Narain Gadodia was the proprietor of this L.N. Gadodia & Co. On 29th March 1937, L.N. Gadodia entered into a partnership agreement with Deva Sharma. The sole business of the partnership was the selling agency and the partnership was to continue till the selling agency continued. Clause 3 of the agreement provided thus:

"3. That on the termination of the selling agency business neither of the parties to this

agreement shall take up the said selling agency from the mills."

Gadodia was the financing partner and Deva Sharma was the main person responsible for running the business. That Deva Sharma was the persona grata with the British India Corporation is reflected in the correspondence between the parties. The selling agency was renewed from time to time. Some time in 1939, L.N. Gadodia made efforts to introduce his son into the work of selling agency, but that was resented by Deva Sharma. The Corporation also did not approve it and once threatened to terminate the agency which stopped Mr.Gadodia's effort to introduce his son. The agreement was validated upto 31st December 1945.

(ii). On the other hand, Deva Sharma negotiated for the selling agency in his favour excluding Gadodia a few days before the expiry of the agreement. This new agreement was entered into with a firm named M/s Sharma & Co. which was signed on behalf of the firm by one Shiv Nath Sharma, the brother of Deva Sharma. This led Gadodia to file a suit. It sought (a) a declaration that Deva Sharma was the real owner of this Sharma & Co., (b) a permanent injunction restraining the Defendants from carrying on the selling agency, and (c) rendition of accounts of Sharma & Co. from 1st January 1946 and payment of the Plaintiff's share of 12 annas in a rupee out of any profits or in the alternative, a

decree for Rs.6,00,000/- as damages. The Sub-Judge, who heard the matter, gave findings in favour of Gadodia and he was granted the declaration that was prayed for and also a decree for rendition of accounts. There were three Defendants to the suit. They filed separate appeals. The learned Judges of the Division Bench differed in their view of the matter and thereafter it was referred to a third Judge (Falshaw J.). Khosla J. had held that the controversy was covered by first part of section 88 whereas Kapur J. had held that the plaintiff Laxmi Narain was not entitled to the benefit of either parts of the section.

(iii). Falshaw, J. noted in his judgment that it was clear that Deva Sharma was a favoured person and in fact the protegee of the British India Corporation. He then noted in para 21 that the first question to be decided was whether clause 3 of the Partnership Agreement was enforceable. Khosla J. had held that the agreement was enforceable whereas Kapur J. had held that it was not. Falshaw J. then referred to **section 27 of the Contract Act** which provides that an agreement in restraint of trade is void. He however noted that exception (1) thereof provided for saving of an agreement not to carry on business of which goodwill was sold.

(iv). The learned Judge thereafter noted that the first part of section 27 laid down the basic principle that every contract in restraint of trade or business

was void, but an exception was made in the case of sale of goodwill of a business. The learned Judge further noted that a modification of the general principle is provided in section 54 of the Partnership Act which provides that partners may agree not to carry similar business for a specified period within a specified area in the event of dissolution. After considering the arguments of both the parties, the learned Judge held that the word "similar" appearing in section 54 does not mean "same" in the strict sense. What was prohibited by the section was the similar business and not the same business. The learned Judge therefore held that the agreement was not the one which was hit by section 54. He therefore held that clause 3 of the agreement was not enforceable.

(v). In Para 32 of the judgment, Falshaw, J. turned to the question as to whether the plaintiff was entitled to the accounts. For that purpose he turned to section 88 of the Trust Act and noted in para 33 that Deva Sharma did not obtain the selling agency in his character as a partner of plaintiff. Deva Sharma and the British India Corporation both regarded that the earlier agency agreement and the partnership were virtually at an end when the negotiations took place between them. Then he held as follows:-

> " The first part of the section obviously contemplates that the pecuniary advantage to be

> gained by a partner or other person in a fiduciary capacity must be in dealing with some third party, and in my opinion the words "by availing himself of his character" clearly imply that at the time when the transaction takes place which results in the pecuniary advantage, the partner must be purporting to deal with the third party as a partner acting on behalf of the partnership, and also that the third party must be under the impression that he is dealing as such.
>
> No question of this situation arises in the present case in which quite clearly the British India Corporation had itself terminated the selling agency agreement, and was well aware that along with the agreement the partnership would also be terminated, and the Corporation entered into dealings with Deva Sharma and his nominees with full knowledge of the facts."

He, therefore, held that the case was not covered under the first part of the section.

(vi). Later in para 34, the learned Judge turned to the question of the applicability of the second part of the section. He noted that the fact that the Plaintiff had abandoned his plea of collusion between Deva Sharma and British India Corporation made it very doubtful whether a finding that there was in fact some sort of

collusion could be arrived at as the basis of a decision on the applicability of section 88 of the Trust Act. Thereafter at the end of para 34, he held that in his opinion the basis on which the question of applicability of second part of section 88 must be decided is simply that Deva Sharma negotiated for and secured the selling agency business in December 1945 at the time when all interested parties were aware that the selling agency agreement in favour of Gadodia & Co. was due to expire on 31st December 1945. The case was, therefore, not covered under the second part also.

(vii). Four cases were cited before the learned Judge. One of them has been emphasised before us and which was relied by the learned Single Judge in favour of the Sippys. That was in the case of **Benett v. Gaslight & Coke Co. of London - (1882) 48 LT 156.** That was a case where a trustee had clearly acted behind the back of co-trustees. Therein there was a irrefutable presumption of personal incapacity to retain the benefit. Therefore, it had been held in that matter that by reason of his trusteeship, the person concerned had disqualified from obtaining the agency for himself. That was a case of an express trust. In fact Falshaw J. noted that the work done by Gadodia and Deva Sharma in partnership had hardly anything to do with the giving of the selling agency to Deva Sharma who was all throughout a protegee of the British India Corporation. Deva Sharma’s case could not be compared with one involving

express trust. Falshaw J. therefore held at the end of para 40 as follows:-

> "The principle which they (i.e. the cases) seem to me to establish is that when it is clear that a particular benefit can no longer be secured on behalf of an estate or a partnership, the fiduciary relationship ends and an individual partner or beneficiary of the estate is free to look after his own interests and secure the benefit for himself."

55.(i) The third judgment relevant for this case is **Shanti Prasad Jain v. Kalinga Tubes Ltd. - AIR 1965 SC 1535**. In this matter, the Apex Court was concerned with the scope and applicability of section 397 of the Companies Act, 1956. Kalinga Tubes Ltd. was initially floated as a private limited company. Originally all of its shares (except a few) were held equally by two groups of shareholders i.e. Patnaik group and Loganathan group. Subsequently, in view of the financial difficulties faced by this company, Government of Orissa requested Shanti Prasad Jain to provide finance and to arrange loans. An agreement was entered into on 27th July 1954 between S.P. Jain, Patnaik and Loganathan. The company itself was however not a party to this agreement. Jain agreed to supply finance on terms that he be allotted shares equal to those held by Loganathan and Patnaik which was to be done after

increasing the share capital of the company. The company would, therefore, have three groups of shareholders represented by Jain, Patnaik and Loganathan holding equal number of shares except a few other small shareholders. These shareholders were also not party to this agreement. The three groups of shareholders were to have equal number of representatives on the Board of Directors. S.P. Jain accordingly undertook to arrange the finance and was appointed Chairman of the company.

(ii). In September 1955, an advertisement was given by Jain as if the company was part of his group. This led to protests from Patnaik and Loganathan and that advertisement was withdrawn. In December 1956, a resolution was passed to convert the company into a Public limited company in order to obtain advances from Industrial Finance Corporation. In December 1957, the Controller of Capital Issues sanctioned the issue of shares of the face value of Rs.39 lakhs and debentures of the face value of Rs.64 lakhs subject to the provisions of section 81 of the Companies Act. This section provided that the new shares would be offered in the first instance to the existing shareholders in proportion, as nearly as the circumstances admit, to the capital paid up on the existing shares at that date, subject to any direction to the contrary, which may be given by the Company in general meeting. Therefore, unless the Company decided otherwise at a general meeting, the new shares of Rs.39 lakhs had to be offered

to the existing shareholders in proportion of their existing shares.

(iii). In the meeting of the Board of Directors on 1st March 1958, S.P. Jain proposed that the new shares should be issued to the existing shareholders as per section 81, whereas Patnaik proposed that a general meeting be called for that purpose. The groups of Patnaik and Loganathan did not have sufficent money to subscribe to the new shares if offered in the first instance to the existing shareholders. In that case those shares would have been taken by S.P. Jain. Thus, if Jain got all the new shares, his group would become the majority shareholder and would get control of the company. Patnaik, therefore, put a resolution which provided for calling of a general meeting. Patnaik's resolution was passed and Jain's proposal was rejected.

(iv). Accordingly, the shareholders' meeting was called on 29th March 1958. Jain did not attend it though he was present by proxy. Jain proposed a resolution that the shares be offered to the existing shareholders and the offer should remain open for 15 days and thereafter if a shareholder did not accept it, it should be deemed to have been declined. Patnaik and Loganathan moved a resolution that the new shares should be allotted privately in the best interest of the Company at the discretion of the Directors on the condition that at least 5% of the face value of shares

applied for was paid as application money, 10% value was paid on allotment and the balance as and when called upon. Patnaik's resolution was passed and Jain's resolution was defeated.

(v). This led Jain to file a suit for a declaration that the resolutions of 29th March 1958 were illegal and void and sought an injunction from acting in pursuance of those resolutions. Initially, an exparte interim injunction was granted. The company offered that in view of the urgency for the funds, the company be permitted to issue 2/3rd of the shares keeping 1/3rd for the Appellant - S.P. Jain. This was not accepted by Jain. Ultimately, on 30th July 1958 the Trial Court vacated the injunction which order was passed on that date at about 11 a.m. As soon as the message of passing of the order was received, new shares were allotted to 7 persons who had applied for the same along with the application money. This happened by about midday and a return was filed with the Registrar of Companies by about 12.40 p.m. Jain moved an application at 12.40 p.m. before the Trial Court praying that the order vacating the injunction be stayed till he moved the High Court. The company informed that the shares had already been allotted. Even so, the court passed an order staying the operation of its judgment for two days. The appeal filed against this order was dismissed in September 1958 and the LPA was dismissed in November 1960. It was contended by Jain that the 7 persons, to

whom the shares wee allotted, were nominees of Loganathan and Patnaik. They paid only the initial 5% of the share money and though the company was in urgent need, the shares were allotted to persons who were not in a position to pay the share money in full.

(vi). Later-on, an extraordinary general meeting was called on 21st September 1960 to increase the share capital from Rs.1 crore to Rs.3 crores. The shares were to be offered to outsiders i.e. other than the existing shareholders. Calling of this meeting led to the application under section 397 of the Act by Jain. It was submitted that issuance of new shares was in furtherance and continuation of the process of oppression and with a view to completely exclude him and his group from control of the company. The new shares would lead Loganathan and Patnaik to acquire more than 75% of the voting strength. Their conduct showed a visible departure from the standard of fair dealing and fair play. It was alleged that affairs of the Company were being conducted causing prejudice to the interest of the Company amounting to mismanagement under section 398 of the Act. A single Judge of the Orissa High Court entertained the petition. It was held that the conduct of Patnaik and Loganathan was oppressive of the minority. This judgment led to the appeals to the Division Bench. The Division Bench held that no such oppression had been established. The application of S.P. Jain was therefore dismissed who carried the

matter to the Supreme Court.

(vii). The Apex Court referred to section 397 and noted that this section deals with the situation where the affairs of the company are being conducted in the manner oppressive to the members, but winding up would unfairly prejudice such members though otherwise the facts justify making of such an order. It also noted that oppression was not defined.

(viii). In para 15 of the judgment, it referred to four leading English cases, viz. (1) Elder v. Elder - 1952 SC 49, (2) George Meyer v. Scottish Co-operative Wholesale Society Ltd. - 1954 SC 381, (3) Scottish Co-operative Wholesale Society Ltd. v. Meyer - 1958-3 All ER 66, which was an appeal from the earlier decision, and (4) Re: H.R. Harmer Ltd. - 1958-3 All ER 689. **The court noted that the propositions which emerge from these judgments are as follows**:-

> "(1) The oppression of which a petitioner complains must relate to the manner in which the affairs of the company concerned are being conducted, and the conduct complained of must be such as to oppress a minority of the members (including the petitioners) qua share-holders.
>
> (2) It follows that the oppression complained of must be shown to be brought about by a majority

of members exercising as share-holders a predominant voting power in the conduct of the company's affairs.

(3) Although the facts relied on by the petitioner may appear to furnish grounds for the making of a winding up order under the 'just and equitable' rules, those facts must be relevant to disclose also that the making of a winding up order would unfairly prejudice the minority members qua share-holders.

(4) Although the word 'oppressive' is not defined, it is possible, by way of illustration, to figure a situation in which majority share-holders, by an abuse of their predominant voting power, are 'treating the company and its affairs as if they were their own property' to the prejudice of the minority share-holders and in which just and equitable grounds would exist for the making of a winding up order..... but in which the alternative remedy provided by section 210 by way of an appropriate order might well be open to the minority share-holders with a view to bringing to an end the oppressive conduct of the majority.

(5) The power conferred on the Court to grant a remedy in an appropriate case appears to

envisage a reasonably wide discretion vested in the Court in relation to the order sought by a complainer as the appropriate equitable alternative to a winding up order."

(ix). In para 13 of the judgment, the Court noted that section 397 was a successor to earlier section 153-C of the Indian Companies Act, 1913 which was based on section 210 of the English Companies Act, 1948. In para 18, the Court noted that in Harmer's case it was held that word "oppressive" meant burdensome, harsh and wrongful. It further noted that phrase "oppressive to some part of the members" suggests that the conduct complained of "should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play. But, apart from this, the question of absence of mutual confidence per se between the partners or between two sets of shareholders however relevant to a winding up seems to have no direct relevance to the remedy granted by section 210. It however held that **oppression of some part of the shareholders by the manner in which the affairs of the company are being conducted must be averred and proved. Mere loss of confidence or pure deadlock does not come within section 210**.

(x). In para 19, it laid down, (1) It is not enough to show that there is just and equitable cause for winding up of the company though that must be shown as

preliminary to the application under section 397, (2) Conduct of the majority of the shareholders must be shown as oppressive to the minority, (3) This required that the **events have to be considered not in isolation but as a part of a consecutive story** and there must be continuous acts on the part of the majority continuing **upto the date of petition**, (4) The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough and such oppression must involve an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. This will all depend upon the facts of each case.

(xi). In para 26, the Apex Court held "It is true that by the beginning of 1958 there were differences between the appellant and the Patnaik and Loganathan groups and there was loss of confidence between them". In para 27, it held "It is no doubt true that the shares were issued in haste" (on 30th July 1958). In para-30 it observed that it is said that if Patnaik and Loganathan groups had behaved like honourable men, the agreement could still have been carried out after the company became a public company and that these two groups did not behave honourably when they gave the go-by to the agreement completely. Thereafter the Court observed that there is some force in the contention that Loganathan and Patnaik groups that when they were in need of the appellant,

they took his help; it also does appear that when the company had turned the corner and it was felt that the appellant's help was not absolutely necessary, these groups thought it unnecessary to carry out the spirit of the agreement (though not the terms). Then it posed a question - Can it be said that the conduct of the affairs of the company was carried on oppressively merely because these two groups which in March and July 1958 were in majority did not carry out the spirit of the agreement?

(xi). The Court however held that the decision to make a company more broad based and issue shares to other and not to the existing shareholders cannot be said to be oppressive. It held that the original agreement of July 1954 was not binding even on the private company and that it did not contain any specific provision as to the future issue of capital. In para 27, it even held that the haste with which the shares were allotted on 30th July 1958 cannot really be said to be a part of a design to oppress. "The haste became necessary because the interim injunction was vacated on that day and it felt that if immediate action was not taken and the new shares allotted, there might be further injunction which would further delay the issue of shares and getting the loan from the Industrial Finance Corporation." In para 28, it held that if the fear of Patnaik was correct that the appellant would have purchased all the shares worth Rs.39 lacs for want of money on the part of Patnaik and

Loganathan, their action in preventing such domination cannot be said to be oppressive. **Thus, the pre-emptive action was held to be a permissive conduct.**

(xii). The Court refused to accept that the new allottees were nominees of Patnaik and Loganathan. In para 28 of the judgment, the Court noted that though the company was in urgent need of finance, it accepted only 5% with the application and 10% on allotment and the remainder did not come for a long time. It noted that out of 7 allottees, 6 had to take loan from the Central Bank of India, and a part of the new capital was not received even till the time the application under section 397 was filed. Still the Court held that it would not amount to oppression by the majority once it was held that the allottees were not stooges or benamidars of Patnaik and Loganathan.

(xiii). Thus, it is seen from this judgment that the Apex Court did accept that Patnaik and Loganathan did act with haste and not like honourable men. It noted that there was some force in the argument that Loganathan and Patnaik took help of Jain when they needed it, but when the company turned the corner they thought it unnecessary to carry out the spirit of the agreement. It was absolutely clear that there was absence of mutual confidence between the parties, but ultimately mere lack of confidence between the majority shareholders and the minority is not enough. The

element of lack of probity or fair dealing has to be in the matter of proprietary rights. Since that could not be established, the appeal had to be dismissed.

56. To decide the first point for determination, we will have to note the propositions which emerge from the two judgments in the cases of C.G.Chetty and Deva Sharma (supra) which are as follows:-

(i). To begin with, to apply the rigours of Section 88, the parties must have a genuine fiduciary relationship. In C.G. Chetty's case the Apex Court noted in para-14 that during the last 3 years of the terms of partnership the partners were not on cordial terms and they did not appear to have much of confidence between them. Similar was the position in Deva Sharma's case. Gadodia had tried to introduce his son in partnership which was resented by Deva Sharma and there is considerable correspondence on record showing the strained relationship between the parties.

(ii). Besides, as held by the Apex Court in C.G.Chetty's case when the period of partnership is coming to an end, there is no absolute rule of law or equity that the business run by the partnership must necessarily be renewed for the benefit of all the parties. As held in Deva Sharma's case when it is clear that the particular benefit can no longer be secured for the partnership, the fiduciary relationship ends and the individual partner is free to look after his own

interest and to secure the benefit for himself.

(iii). As held in Deva Sharma's case, to attract the first part of Section 88 the pecuniary advantage to be gained by the partner in a fiduciary capacity must be in dealing with some third party as a partner acting on behalf of the partnership. Falshaw J. held that such a situation did not arise since British India Corporation itself had terminated the agency and therefore the occasion to represent on behalf of the erstwhile firm to gain any benefit did not arise. In C.G.Chetty's case also the plaintiff had failed to establish that the defendants had used either the funds or the goodwill of the firm for obtaining the renewal. Therefore at the end of para-13 the Apex Court held that the first part of Section 88 clearly did not apply.

(iv). To attract the second part of Section 88, it will be necessary to have the third party in the proceedings to establish the collusion between the third party and the defendant. In Deva Sharma's case British India Corporation had been deleted as a defendant. In the present case also Contship has been deleted as a defendant.

(v). The learned Single Judge has commented in para 25 that the fact situations and the principles laid down in both the cases while construing Section 88 were similar. In Deva Sharma's case the contract was coming

to an end but before hand he negotiated with British India Corporation to enter into an agency business with the new firm set up by his relatives. In that matter there was a specific clause entered into by the parties that on termination of the agency neither of the parties will take up the selling agency from the Corporation. Yet after referring to Section 27 of the Contract Act, the conduct on the part of Deva Sharma as noted above was not held to be in breach of his fiduciary duty. Similarly in C.G. Chetty's case, the five partners had entered into an understanding that they would run the business in partnership even if any one of them becomes the successful bidder and according to the plaintiff the partnership business was agreed to be continued even after the expiry of the term of previous partnership though there was no sepcific clause to that effect in the partnership deed. The renewal of the lease by two of the partners for themselves at the end of the earlier period was not held to be in breach of Section 88 of the Trust Act.

(vi). In Deva Sharma's case, he negotiated with British India Corporation for a fresh contract with the firm of his relatives, without informing his partner L.N.Gadodia. In C.G. Chetty's case, the partners in whose name the lease was renewed, sent notices to other partners for settlement of the accounts but they did not mention in the notice that the lease had been renewed in their favour. In neither of the cases the conduct was

held to be in breach of fiduciary duty.

(vii). In C.G. Chetty's case, the Court noted that the personal conduct of the lessees was the determining factor for grant of the fresh lease to them. In Deva Sharma's case, it was clear that he was dealing with British India Corporation all throughout on behalf of the earlier firm and in fact as observed by the Court, he was the protege of the Corporation. In both the cases the professional conduct of the defendants concerned was the factor which led to the entering of the new contract with them and that was not held as obtaining a gain availing of the benefit of the character as a partner in the earlier partnership.

57. The narration of the facts as above shows that in Company Petition No.41 of 2002 Sippys were principally relying upon the diversion of the Contship agency as the act amounting to breach of fiduciary obligations and which according to them amounted to their oppression in SSTS. As far as Company Petition No.40 of 2002 is concerned, it is their case that they have additionally relied upon non-return of the loan given to Puris by SSCO within the time stipulated therefor. As against that in Petition No.41 of 2002, the defence of Puris is that there was hardly any confidence left between the parties and that there were already financial problems between the two. Besides,

the termination of Contship agency is a conscious decision by third party and on that happening there was no business opportunity left for SSTS. As far as Petition No.40 of 2002 is concerned, their defence has been accepted by the learned Single Judge, namely, that the allegation of unjustified and unexplained delay in returning the loan has not been established. Sippys were fully aware about the delay or the causes thereof and they had condoned it and, therefore, raising of this issue amounts to they not approaching CLB with clean hands. The submission of Puris is that if Sippys had not approached the CLB with clean hands in this matter, that should be held against them in Company Petition No.40 of 2002 also. In any case, Company Petition No.40 of 2002 should be decided on its own merits and not for whatever reasons that are canvassed in Petition No.41 of 2002.

58. When we approach the first point for determination that we have framed, a few subsidiary questions arise (i) Whether there was any fiduciary relationship left between the parties by the time the two Company Petitions were filed or whether the issue of Meridian raised by Puris is a bogie? (ii) Whether any business opportunity was still available to SSTS in the background of specific assertion of Contship that it has consciously terminated its agency with SSTS? (iii) Whether the conduct on the part of Puris in not disclosing the receipt of the letter of termination of

the agency, floating another company in advance, not coming to the negotiating table and defending the passing of actions could be considered as unfair conduct within the meaning of second part of Section 88 of the Trusts Act? (iv) Whether the resultant diversion of the Contship agency amounts to oppression of Sippys in SSTS? (v) Whether any direction could be given to make the alleged loss good to Seaworld?

59. As far as Company Petition No.40 of 2002 is concerned, the subsidiary question will be whether the Petition would survive only on the basis of their conduct vis-a-vis SSTS after it is held that Sippys had not approached the CLB with clean hands?

60. When it comes to the application of the first part of section 88, Dr.Tulzapurkar, learned Counsel appearing for Sippys, has contended that since the two companies are in the nature of quasi partnership, once mutually trust is eroded by reason of oppressive action, the other group becomes entitled to the reliefs. He has relied upon a paragraph from **Pennington Company Law**, 7th Edition page 897 in support at pages 886, 889, 897 and 900 for that purpose. He has relied upon a passage from **Gore Browne** from Company law 44th Edition at para 28.20 to the effect that in a small Private Company it is legalistic to segregate the separate capacities of the same individuals as a shareholder, director or employer. It is however material to note that to apply these

principles the element of confidence must be subsisting when the allegation is made. In the present case, can it be said that Sippys were innocent suffers when it is clearly placed on record that Meridian which was subsidiary to SSCO and which was under the control of Sippys, had consistently suffered losses and substantial amounts were diverted from SSCO to Meridian going into crores. The subsidiaries of Meridian however were in profit. There has been sufficient correspondence prior to the filing of the company petitions in June/July 2002. Can it, therefore, be said a mere after-thought? The inescapable conclusions are that there was hardly any confidence left between the parties. That was also the factor noted in C.G. Chetty's case (supra) as also in Deva Sharma's case (supra), the two leading Indian cases which we have discussed earlier. It is, therefore, not possible to accept that any case is made out under first part of Section 88 of the Trusts Act.

61. When we consider the application of second part of section 88, we have to look to the question of availability of business opportunity and the conduct of Puris in that behalf. Dr.Tulzapurkar has relied upon a series of English judgments which are on the responsibilities of the trustees. Starting with **Keech vs. Stanford** which was a case of express trust, he has referred to the judgments which continued to adopt the principle of strict responsibility in the subsequent judgments. Thus, he relied upon the judgment in an old

English case in **Re Ireland decided in the year 1813 reported in 3 English Report page 694.** This was a case of expiry of the lease and the trustee renewing it for his own benefit which was naturally criticised. Similar are the judgments in **Head vs. Gould reported in 1898 (2) Ch. Division page 250**, **Biss vs. Biss reported in (1903) 2 Ch. Division** (which is in a case of concerning a partnership lease), **Clegg vs. Edmondson decided in 1857, reported in 8 DDE-G.M. at page 593** (which is concerning a mining partnership), **Re Knowles Wheel Trust Nelson vs. Knowles** reported in **(1948) 1 A.E.R. 866,** which is concerning the responsibility arising out of a Will. These are all cases arising out of express trust. As far as the position in India is concerned, it would be guided by the law laid down concerning this aspect in C.G. Chetty's case (supra) wherein it has been held that there is no absolute rule of law and equity governing the conduct of the partners that when it comes to renewal of a lease it must necessarily enure for the benefit of all the parties. The Apex Court has in fact referred to the judgments in Clegg vs. Edmodson and Biss vs. Biss in paragraph 16 and then observed in para 19 that there is a presumption of fact as distinguished from presumption of law which is rebuttable. The pronouncement in C.G. Chetty's case decided in 1958 has held the field for all these years and we cannot depart therefrom on the basis of the English judgments which are considered therein and explained.

62. The law with respect to fiduciary responsibility of partners or directors in India is as explained in Chetty's case (supra) which has considered the English cases. Not renewing the lease in favour of the other partners was not held to be in breach of this obligation in Chetty's case. We have noted that in Deva Sharma's case, entering into a contract by Deva Sharma with British India Corporation by setting up another entity was not held to be in breach of his obligation under Section 88 of the Trusts Act. It was specifically observed that when an opportunity is not available to the partnership, there is nothing wrong for a partner to avail of it himself. Whereas Chetty's case is one where the lease had expired and it was to be renewed, in Deva Sharma's case the earlier agreement was coming to an end and it was terminated at that time. In the present case, we are concerned with the situation wherein Contship had the right to terminate the agreement and it has terminated and justified it. In Deva Sharma's case, British India Corporation was deleted as a defendant and, therefore, Falshaw, J. held that it was difficult to establish collusion in the absence of a vital party. In the present case, Contship got itself deleted. But in any case, as noted above, it specifically stated that it was supporting Puris and that it had all throughout dealt with Puris only. In C.G. Chetty's case, the party obtaining the lease had shown the professionalism which was recognised by the then Madras Government. In Deva Sharma's case, he was the man on spot and was a

protege of the British India Corporation. In the present case, Contship had in terms stated that it recognised only Puris as their agent in India. Thus, before Puris joining the Samrat group, it did not have the Contship agency. At one time it was with SSCO after Puris joining it and for some time it was discontinued from SSCO and later-on offered to SSTS. Therefore, SSTS or Sippys cannot, say that Contship was bound to enter into and continue the agency with them only. Hence, in the event of termination of the agency, the business opportunity came to an end, and it ceased to be a corporate opportunity for SSTS.

63. The American judgments cited by Mr.Chinoy are, therefore, definitely apposite the position which the Indian Courts have taken. If Puris were to inform Sippys having received the termination letter, that undoubtedly could have been a proper conduct on their part and would have amounted to taking shelter in what is called as "safe harbour", as held in the case of Robert Broz (supra). However, not informing Sippys by itself cannot lead to the position as in England where it is held that it is immaterial as to whether the person concerned would have availed of the opportunity offered to him.

64. It is thus clear that there was hardly any fiduciary relationship left between the parties by the time the two Company Petitions were filed. The issue of

Meridian raised by Puris should not be said to be a bogie inasmuch as they have clearly brought it on record that by 2000-01 an amount of Rs.4 crores was diverted by Sippys to Meridian creating a liability for the Puris and they were not being relieved of their personal guarantee. In view of the specific assertion of Contship through its affidavit that it has consciously terminated its agency with SSTS, it could no longer be said that any business opportunity was available to SSTS. The conduct on the part of Puris in floating a company by using the word "Samrat" in advance could not be said to be a straight conduct. Sippys are alleging it to be a planned effort whereas Puris would explain it as an unconnected action. The passing off suit filed by Sippys was therefore fully justified, but having said that, it cannot be ignored that the opportunity to continue the business with Contship was lost to SSTS the moment Contship terminated its agency with SSTS. Contship has given its own explanation for that action. It has pointed out that it all throughout recognised Puris as its representative in India. Floating another company by using the name "Samrat", not informing about the letter from Contship terminating the agency of SSTS, and not coming to the negotiating table and contesting the passing off action could not be said to be a good conduct on the part of Puris. That however cannot lead to a conclusion that if Puris were to disclose the termination of agency by Contship, Sippys would have been able to persuade Contship to continue its agency

with SSTS. Sippys have not made any such effort after coming to know about the termination and Contship has also specifically placed it on affidavit that it has consciously terminated the agency with SSTS. Hence as far as the aspect concerning the business opportunity being available is concerned, it cannot be decided in favour of Sippys and SSTS.

65. In the circumstances, as far as the second part of Section 88 of the Trusts Act is concerned, it will have to be held that the business opportunity was no longer available to SSTS and, therefore, if the opportunity is availed of by Puris, it cannot be said to be in breach of their fiduciary obligation.

66. When we come to the second point for determination, Dr.Tulzapurkar has relied upon the judgments of English Courts to explain the aspect of oppression under the Companies Act. Amongst others he has relied upon the judgment in **Re London School of Electronics Limited** decided in 1985 and reported in 1986 (1) Ch. Division page 211. This was a case of diversion of business opportunity and it was held therein that the petitioner is entitled to an order of purchase of shares. It is however material to note that in England the ground for relief is that of an "unfairly prejudicial conduct". As rightly pointed out by Mr.Chagla, in England, the term "oppression" under Section 210 of the Companies Act came to be substituted

by the words "unfairly prejudicial conduct" to make it clear that it was not necessary to show the act complained of was illegal. In India, the position remains as it is and this aspect has been explained by the Apex Court in **Needle Industries (India) Ltd. & ors. vs. Needle industries Newey (India) Holdings Ltd. & ors. reported in AIR 1981 S.C. 1298**. In para-52 of this judgment the Apex Court has explained this position which is to the following effect:-

> " It is clear from these various decisions that on a true construction of Section 397, an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief under that section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as shareholder. It may be mentioned that the Jenkins committees Company Law Reform had suggested the substitution of the word "Oppression" in Section 210 of the English Act by the words "unfairly prejudicial" in order to make it clear that it is not necessary to show that the act complained of is illegal or that it constitutes an invasion of legal rights (see

> Gower's Company Law, 4th edn. page 668). But that recommendation was not accepted and the English Law remains the same as in Meyer, (1959) AC 324) and in Re H.R. Harmer Ltd., (1959) 1 WLR 62 as modified in Re. Jermyn St. Turkish Baths (1971) 3 All ER 184. We have not adopted that modification in India."

67. As seen from the above quotation, the Jenkins Committee Report on Company Law Reform had suggested the substitution of the word "oppression" in section 210 of the English Act by the phrase "unfairly prejudicial". It had not been accepted when the judgments in the cases of Meyer and Harmer Ltd. (supra) were rendered. It has however been subsequently accepted and the test in the new section 459 of the English Companies Act thereafter is whether the conduct was unfairly prejudicial and not merely illegal. Dr.Tulzapurkar had relied upon Palmer's Company Law on the general test for unfair prejudicial conduct, namely that it should be that of a reasonable bystander and then on Pennigton's Company Law for what is an oppressive conduct. These authorities on the English Law would not be of assistance for the construction of section 397 of the Indian Companies Act since we have not adopted any such modification in India. In fact, if we see the discussion under the caption "unfair prejudice" in Chapter 66 of Palmer's Company Law (24th Edition), the learned author has noted that there are dicta from the

courts that the phrase "unfair prejudice" must be given a broader meaning than the word "oppression", and referred to the relevant cases.

68. We have discussed the judgment in the case of S.P. Jain (supra) in detail. The conduct of Patnaik and Logonathan could by no manner be described as a straight conduct. They were undoubtedly having the majority shares. The Apex Court noted that there was some force in the contention that when Logonathan and Patnaik wanted the help of S.P. Jain, they took his help. Once the Company turned the corner, they did not think that his help was necessary and, therefore, they did not think it necessary to carry out the spirit of the agreement though not the terms. The Court specifically posed the question that merely because they did not carry the spirit of the agreement, could they be said to have conducted the affairs of the company oppressively. The Court also noted that if they had behaved like honourable men, the agreement could still have been carried and yet the Court did not hold that their conduct was oppressive. This is because as held in that matter mere loss of confidence does not lead to any such conclusion. Not only that but the quick legal proceedings taken by Logonathan and Patnaik were explained by holding that the haste had become necessary because if that was not resorted to there might have been further injunction. Thus, the pre-emptive action was held to be a permissible conduct.

69. In the present case, there is no difficulty in saying that the conduct of Puris was not a straight conduct. It would have been better if they had disclosed to Sippys the fact that Contship had terminated the agency. Their action in setting up another company in advance and then defending the passing off action on whatever grounds available was also not a fair method of dealing with one's colleague in the company. The passing off action was, therefore, rightly decided in favour of Sippys and Puris agreed to change the name of the company. However, having said that, it cannot be stretched beyond that to say that it amounted to oppression of Sippys in the matter of running of SSTS. It must be shown as something affecting their proprietary rights as shareholders. This is essentially a case of a third party terminating the contract of its own and justifying it. Undoubtedly, Puris are beneficiaries thereof. However, that by itself cannot amount to a breach of fiduciary obligation or an oppression of Sippys.

HENCE THE FOLLOWING DECISION ON THE THREE POINTS FOR DETERMINATION FRAMED EARLIER:

70. In the circumstances, as far as the first point for determination is concerned, we hold that on account of termination of agency of SSTS by Contship, SSTS had no longer had any business opportunity. Therefore, the

diversion of Contship agency from SSTS to Seaworld thereafter cannot amount to breach of fiduciary duty on the part of Puris as its directors as referable to section 88 of the Indian Trusts Act.

71. As far as the second point for determination is concerned, we hold that floating of another company with the name Seaworld by Puris rightly invited a passing off action by Sippys. Their conduct in that behalf as also not disclosing the receipt of the termination letter, not coming to the negotiating table and defending the passing off action some way or the other could not be said to be a straight conduct. At the same time, it will not amount to oppression of Sippys within the meaning of section 397 of the Companies Act or that it led to mismanagement of SSTS under section 398 thereof.

72. As far as Company Petition No.40 of 2002 is concerned, in our view, the submission of Mr.Chagla is well taken. That petition has to be decided on its own merits as held by the Apex Court in the case of **Sangramsinh Gaekwad (supra)**. In fact once it was held that Sippys had not come with clean hands in the matter of the allegation concerning the NOL shares, Company Petition No.40 of 2002 ought to have been independently dismissed. However, in any case, since Sippys have drawn a support for this Company Petition No.40 of 2002 on the basis of averments in Company Petition No.41 of 2002, this Petition concerning SSCO must also fail since

we are not entertaining Company Petition No.41 of 2002. A case was sought to be made out for oppression in SSCO on the ground that both SSCO and SSTS are quasi partnerships and, therefore, if a case is made out of oppression in SSTS, that should apply to SSCO also. It is undoubtedly true as held in **Hind Overseas Pvt. Ltd. vs. R.P. Jhunjhunwala reported in AIR 1976 S.C. 565** that in a given case the principle of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing veil it is found that in reality it is a partnership. This view is reiterated by the Apex Court in paragraph 245 of the report in 123 Company Cases 566 in the case of Sangramsingh Gaekwad vs. Shanta Devi (supra). However, since Sippys have failed to make out a case of oppression against Puris in SSTS, their petition concerning oppression in SSCO must also fail.

73. Then we come to the third point for determination. The directions given by the CLB are based on its findings in para 20 of its judgment that Puris have preplanned the event. The same cannot be sustained once we note the loss of confidence between the parties and the clear stand taken by Contship in its affidavit before the CLB. Besides, any such finding cannot otherwise also survive after Contship is deleted from the Company Petitions. Setting up of another company of the name "Samrat" and not coming to a negotiating table or defending the passing off action by

some way or the other rightly led to the success of Sippys in the passing off action and the dropping of the word "Samrat" from the name of the new company by Puris. If Puris were to disclose receipt of the termination letter from Contship, that would have amounted to landing in a "safe harbour" as held in the case of Robert Broz (supra). All this will have to be distinguished from the question of availability of a business opportunity, particularly when Contship has defended the termination by clear affidavit before the CLB. Once the opportunity was not available to SSTS, it could not be held to be a breach of fiduciary obligation if Puris took it. The findings of CLB on the second part are influenced by its finding with respect to the first part concerning conduct of Puris. In our view, all those findings are erroneous and will have to be held as unsustainable. Consequently, the judgment and order of the learned Single Judge accepting this approach and upholding those findings is also unsustainable.

74. Since Puris succeed in Company Petition No.41 of 2002 concerning SSTS, the subsequent directions for valuation of the shares and exchanging them will have to be set aside. Similarly there will not be any occasion for Seaworld to make the alleged loss good. The directions given by the CLB and the learned Single Judge are sought to be defended as necessary directions under section 402 of the Companies Act. Once the first two

points for determination are decided as above, there is no occasion to give any such direction. The direction as given by the CLB and the learned Single Judge is on the lines of the English Law as in Industrial Development Consultants v. Cooley - (1972) 2 All E.R. 162, wherein it was held that question whether the benefit of the contract would have been obtained for the plaintiff, but for the defendant's breach of fiduciary duty was irrelevant. In that judgment, it was held that it was irrelevant that as a result of the order to account, the plaintiff would receive a benefit which they would not have otherwise received. Following the law laid down by the Apex Court in C.G. Chetty's case (supra) and the Punjab High Court in Deva Sharma (supra), firstly we have held that there is no breach of fiduciary duty. It is only if the benefit of the contract could have been obtained by Sippys that they could have sought any such direction. Besides, as held in S.P. Jain v. Kalinga Tubes (supra), mere loss of confidence or pure deadlock would not lead to the finding of oppression. The conduct must affect the rights of the claimant in the matter of his proprietary rights as shareholder. Termination of the agency by a third party with the company and thereafter entering into a contract by the third party with one of the directors cannot therefore amount to oppression of the other group of directors who are holding equal shares in the company. The findings and the directions given by the CLB of making the loss good until a certain period

(which period was extended by the learned Single Judge), the direction for valuation and purchase of shares of each other and modified as above by the learned Single judge are unsustainable and are set aside. The third point for determination is decided accordingly.

75. As stated above, as far as the direction given by CLB in Company Petition No.40 of 2002 to Puris to pay additional interest on the alleged delay in refunding the amount of Rs.49 Lakhs is concerned, the same was set aside by the Single Judge himself and the same is not challenged by Sippys. From amongst the three directions given by the CLB on Company Petition No.41 of 2002, the direction to make the loss good as sustained and extended in time by the Single Judge cannot survive since no case for oppression has been made out. It is no doubt true that as held by the Apex Court in Needle Industries' case (supra) that though a party had failed to make out the case of oppression, the Court had power to do substantial justice between the parties and appropriate directions could be given under Section 402 of the Act. Inasmuch as the relations between the parties are strained, the directions for valuation and purchase of shares of each other could have been sustained independently. However, what we find is that even during the pendency of these Appeals, the parties were negotiating amongst themselves for an appropriate way of separation from time to time. In the circumstances, we are of the view that since we have

held that the Company Petitions were not tenable, it would not be proper to maintain even that direction and the parties should be left to resort to their remedies either by negotiations or by appropriate actions. Dr.Tulzapurkar appearing for Sippys submitted that in a winding up action Sippys will not get anything once the Contship agency is allowed to be retained by Seaworld. However, having held that there was no breach of fiduciary duties or oppression involved in the Contship agency shifting to Seaworld, no such equitable remedy could be provided to Sippys. Seaworld cannot be forced to account for the alleged loss of SSTO or Sippys on any such ground.

76. Mr.Doctor has submitted that even if Company Petition No.41 of 2002 succeeds, any such direction of making the loss good cannot be given against Seaworld. In view of the above, we are not required to express ourselves on this aspect.

77. In the circumstances, we pass the following order:-

(1). The present Appeals being Appeal Nos.359, 468, 396, 469 and 358 of 2004 are all allowed.

(2). The judgment and order passed by the learned Single Judge dated 23rd February 2004 is quashed and set aside, except to the extent the learned Judge held that

Puris were not liable to pay any interest on the alleged delay in the return of Rs.49 Lakhs to SSCO.

(3). Consequently Company Appeal Nos.1 of 2004, 4 of 2004 and 2 of 2004 filed by Puris will stand allowed.

(4). Company Appeal No.5 of 2004 filed by Sippys will stand dismissed. The order directing Puris to make the loss good for an indefinite period until the shares are exchanged cannot be sustained and is set aside.

(5). Company Petition Nos.40 and 41 of 2002 filed to the CLB will both stand dismissed.

78. (1) Consequently all the Motions in these Appeals will stand disposed of, including Notice of Motion No.391 of 2005 taken out by a third party.

(2) As far as Notice of Motion No.391 of 2005 is concerned, however, we additionally observe that it will be open for the Applicants therein to take their own steps by resorting to their independent proceedings for recovery of the deposit that they have made to SSCO. Apart from observing as above, we do not pass any order on this Motion. The same stands disposed of.

79. Parties will bear their own costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)

80. After the judgment was pronounced, Dr.Tulzapurkar, learned Counsel appearing for Sippys, applied that the order passed by the learned Single Judge giving a clarification at the end of para-58 be continued for a period of 16 weeks. The learned Single Judge had clarified that the arrangement, as directed by the Company Law Board as observed in para-26 of its judgment, shall be maintained for a period of 8 weeks as aforesaid. He made a request that, that arrangement be continued for a further period of 16 weeks to enable Sippys to take further steps. Mr.Chinoy, learned Counsel appearing for Puris, left it to the Court to pass appropriate order.

81. We accept the request of Dr.Tulzapurkar. The arrangement, as directed by the Company Law Board and as observed in para-26 of its judgment, will be maintained for a period of 16 weeks hereafter.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)